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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 896

ANDREW J. KALERAK, JR., ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior, AND STATE OF ALASKA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Andrew J. Kalerak, Jr., et al., plaintiffs in this action, pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is at 396 F.2d 746. It is reprinted at Appendix A, pp. 1a to 6a, *infra.* The opinion of the United States District Court for the District of Alaska is not reported. It is reprinted at Appendix B, pp. 7a to 19a,

infra. The decision of the Secretary of the Interior is reported at 73 I.D. 1. It is reprinted at Appendix C, pp. 20a to 39a, *infra.* The decision of the Bureau of Land Management is not reported. It is reprinted at Appendix D, pp. 40a-43a, *infra.*

JURISDICTION

The decision of the Court of Appeals was issued on June 19, 1968. A timely petition for rehearing was denied on September 23, 1968. On December 14, 1968 Mr. Justice Douglas extended the time to file this Petition until January 3, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Alaska Statehood Act grants that State the right to select up to 102,550,000 acres of public lands which are "vacant, unappropriated and unreserved at the time of their selection"; it also gives the State the exclusive right of selection during a 90-day period "upon the revocation of any order of withdrawal." Alaska filed an application selecting certain lands while they were withdrawn, and after revocation of the withdrawal order, filed amendments thereto seeking additional lands. An Interior Department regulation, with the force of law, provides that amendments to invalid selections will not be allowed.

The question presented is whether, notwithstanding the governing statute and regulations, the court below lawfully sustained the Secretary's award of the originally selected lands to Alaska on the ground that the State "intended" its "amendments as a reassertion of the original land descriptions"?

STATUTES, REGULATIONS AND PUBLIC LAND ORDERS INVOLVED

This case involves §§ 6(a), 6(b) and 6(g) of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. ch. 2 §§ 6(a), (b) and (g). It also involves Interior Department regulations 43 C.F.R. §§ 1821.6-6, 2222.9-3, 2222.9-4, 2222.9-5 and the Department's Public Land Orders 576, 14 F.R. 1614 and 3022, 28 F.R. 3661. These are reprinted in pertinent part in Appendix E, *infra*.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners are private individuals who made separate applications for homestead and trade and manufacturing sites on public lands. The State of Alaska claims the same lands as part of a prior selection which it had made pursuant to the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. ch. 2, which authorizes it to select up to 102,550,000 acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection." The Secretary of Interior sustained Alaska's claim, reversing a decision of the Office of Appeals of the Bureau of Land Management which had declared Alaska's selection to be invalid because the lands were *not* "vacant, unappropriated, and unreserved at the time of their selection," but were, rather, in a state of withdrawal. The controversy is entirely one of law, specifically, of the Secretary's duty to comply with the clear language of the Alaska Statehood Act and with his own regulations promulgated pursuant thereto and to the public land laws generally.

A. The Basis of the Parties' Conflicting Claims

The disputed land is located in Townships 11 and 12 North, Ranges 1 and 2 West, Seward Meridian, Alaska. At the time Alaska became a State, the land was not open to entry, having been withdrawn by the Secretary "from all forms of appropriation under the public land laws." Public Land Order 576, 14 F.R. 1614 (March 29, 1949) (p. 49a *infra*). The Secretary's decision describes the beginnings of what it candidly refers to as the "attempt to transfer the selected lands from the Federal Government to the State" (p. 21a, *infra*):

"[On March 8, 1962] the City of Anchorage [requested] the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for water shed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of P.L.O. 576 and, when that was done, the State selection would become effective immediately."

On January 8, 1963, invoking the Alaska Statehood Act, Alaska filed formal application A-058566 for 26,880 acres of public land, including the lands withdrawn by P.L.O. 576, among them all lands involved in this case. It is reprinted in Appendix F, pp. 51a-52a *infra*.

On April 8, 1963, the Secretary revoked P.L.O. 576 insofar as it affected the lands involved in this litigation. P.L.O. 3022, 28 F.R. 3661. The Order declared that the State of Alaska would have a preferred right to select the lands for three months, and that beginning July 8, 1963, the lands would be subject to the operation of the public land laws generally (p. 50a *infra*).

As the Court below recognized, "during the ninety-day period Alaska did not file a new application for the selecting of the 26,880 acres of land (including those here in question) which were described in its application of January 8, 1963." However, by four separate letters the State amended its original application, adding to the lands described in the January 8 application, but not mentioning any of the land involved herein.[1] These applications were filed in the

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[1] The letters were identical in form, differing only in date and description of the lands selected. They were addressed to the Anchorage Land Office of the Bureau of Land Management and Signed by John E. Friberg, Acting Selection Officer of the State's Department of Natural Resources. The text of the first of these letters was as follows:

Gentlemen:

Reference is made to State selection application, Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are lands which the State should have selected within the general boundaries of the selection application. The State of Alaska hereby requests that its selection application be amended to include the following described lands:

T. 11N., R. 2W., Seward Meridian (Unsurveyed)

Section 14: S-½	320.00 Acres
(See Exhibit A Attached)	630.00
Containing Approx	950.00 Acres

Thank you for your co-operation.

Lands office on April 8, 1963; May 24, 1963; March 13, 1964, and March 17, 1964. (See p. 22a, n. 4, *infra*). The first two dates fell within the 90-day period.

On October 8, 1964, the Anchorage Land Office directed the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks, which the State did. See p. 20, n. 17, *infra*.

On May 27. 1965, petitioner Kalerak filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW-¼ sec. 19, T. 12N., R. 2W., S.M., Alaska. On separate days between May 28 and June 17, 1965. the other petitioners filed their claims, also within the area covered by Alaska's January 8, 1963 selection. See p. 20a, n. 1, *infra*. On June 9, 1965, the Anchorage Land office issued a decision refusing to accept Kalerak's application for recordation on the ground that it conflicted with the State's selection. The land office made the same rulings with respect to the applications of the other petitioners.

On July 29, 1965 the state filed a blanket selection on all lands which had been selected on January 8, 1963 or in the subsequent amendments.

B. The Appellate Proceedings Within the Interior Department

1. Bureau of Land Management

Kalerak and the other applicants thereupon filed appeals with the Bureau of Land Management of the Department of the Interior. Ruling on Kalerak's appeal, the Chief of the Office of Appeals determined that Alaska's application was not valid and that Kale-

rak's homestead claim should have been accepted and recorded by the land office. He wrote:

> "The Act of July 7, 1958, *supra,* grants to the State of Alaska the right to select, within 25 years from January 3, 1959, not to exceed 102,550,000 acres *from the public lands of the United States which are vacant, unappropriated and unreserved at the time of their selection.*
>
> "It cannot be said that the subject land was vacant, unappropriated and unreserved, at the time the State of Alaska filed its selection application on January 8, 1963. The record shows that the land in question was included in some 17,800 acres of lands which were withdrawn by paragraph 4 of Public Land Order 576 of March 29, 1949, * * *. The lands were so withdrawn at the time it filed its selection application in the land office on January 8, 1963 * * *. The Department has consistently held that an application filed for land while the land is withdrawn is invalid. The fact that the land was later restored from the withdrawal does not validate the application. [Citing cases]. * * *
>
> "It can only be concluded then that the land embraced in the homestead claim of the appellant, Andrew Kalerak, Jr., was in fact open to settlement or occupancy as a homestead entry as claimed in his notice of location filed in the land office on May 27, 1965. Therefore, the appellant's notice of location is proper for acceptance and recordation as of the date of its filing in the land office." (Pp. 41a, 43a, *infra,* emphasis in original.)

2. The Secretary of the Interior

Alaska appealed to the Secretary of the Interior. On January 20, 1966, in a decision by the Deputy Solicitor, the Secretary reversed the Bureau of Land Management, and approved the Anchorage land office's

refusal to record the petitioners' several notices of occupancy or settlement.[2]

As the Court of Appeals later summarized his decision (pp. 3a-4a, *infra*), the Secretary ruled, alternatively:

> (1) Whether or not Alaska's original selection was defective because made with reference to lands which were then withdrawn, it nevertheless accomplished a segregation of those lands such that they were not subject to applications and appropriations under the public land laws, the result being that plaintiffs' claims for settlement or location, made while such segregation was in effect, were invalid; and
>
> (2) Alaska's four amendments of its original application for selection, made after the withdrawal of the lands had been revoked, amounted to a reapplication for selection of the lands described in the original application, the result being that plaintiffs' claims, subsequently tendered for filing, were properly rejected.

C. Judicial Proceedings

1. The District Court

Petitioners then brought this action in the United States District Court for Alaska against the Secretary of Interior, praying that his decision be reversed and the proceeding remanded to the Anchorage District Land Office for proper recordation of petitioners' claims. The State of Alaska was permitted to intervene on behalf of the Secretary. On cross-motions for

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[2] With respect to petitioners other than Kalerak, the Secretary exercised his authority to assume jurisdiction over cases pending on appeal in the Bureau of Land Management.

summary judgment, the District Court set aside the Secretary's Decision.

The Court held first that Alaska's selection of January 8 was not a valid selection. The Court declared:

> "Lands which have been withdrawn for a lawful purpose are not public lands and are to be regarded as excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. (P. 10a, *infra*).

The Court then observed that § 6(g) of the Alaska Statehood Act "stated in clear and unambiguous language that where the land has been withdrawn that *upon* the revocation of the order of withdrawal the State shall have not less than 90 days, *during which period* the State shall have a preferred right of selection. Where, as here, Congress has expressed itself in clear and unambiguous language it must be held to have meant what it plainly expressed." (Pp. 12a-13a, *infra*, emphasis in original.) The Court concluded (p. 17a, *infra*):

> "Regardless of any reliance that the State may have placed on the Bureau of Land Management's interpretation of the statute and applicable regulations prior to April 8, 1963, no reason existed from that day forward to justify reliance on the practices, understanding, notices, agreements or interpretation which existed between the City, the State and the Bureau of Land Management. Section 6(g) of the Act, section 76.15 [now 2222.9-4] of the regulations and the provisions of PLO 3022 specifically and clearly spelled out what steps the State was required to take to obtain a preferred right of selection and the precise period of time within which such right had to be exercised. In view of this, the State cannot seriously

> contend that it was not necessary for it to comply with the law and to exercise its preferred right of selection during the 90 day period afforded it between April 8, 1963, and 10:00 a.m. on July 8, 1963."[3]

2. The Court of Appeals

The Court of Appeals reversed the District Court and reinstated the Secretary's order. The Court did not pass on the segregation issue. Rather, it held that the District Court erred in failing to afford validity to Alaska's selection on the basis of Alaska's four amendments to its original application. The following is the critical language o the Court's opinion (p. 4a, *infra*):

> "In our opinion the district court erred in failing to accept the second of these rulings. While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original application (referring thereto by number), rather than by new applications, (2) the amendments referred to 'additional open lands,' indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice

[3] The Court also held that the Secretary's segregation theory was invalid. On this issue the Court reasoned that the regulation on which the Secretary relied does not "apply to lands that are withdrawn for all forms of appropriation under the public land laws such as those involved in the present case." The Court declared that if the regulation were to extend to withdrawn lands, it "would result in a preference right far beyond that contemplated or authorized by Congress in section 6(g) of the Act and would therefore be void." (P. 13a, *infra*).

published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application."

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Unambiguous Directions of the Alaska Statehood Act and With Principles Firmly Established by This Court.

When Alaska was admitted into the Union it became the beneficiary of the largest land grant in the Nation's history.[4] Section 6(b) of the Alaska Statehood Act entitles the State to select within 25 years and for general purposes, 102,550,000 acres of public lands of the United States in Alaska. The same provision also describes the conditions of the grant: the lands must be "vacant, unappropriated and unreserved at the time of their selection." Alaska was thereby denied the opportunity to make immediate selection of large areas which, as Congress knew,[5] had previously been withdrawn from appropriation by the United States. With respect to such lands, Congress utilized a fa-

[4] S. Rept. 1163, 85th Cong. 1st Sess. (Providing for the Admission of the State of Alaska into the Union) p. 2.

[5] See Hearings Before the Committee on Interior and Insular Affairs, U.S. House of Representatives, 84th Cong. 1st Sess. on H. R. 2535 *et al.*, p. 245, listing public land withdrawals in Alaska of 92,700,000 acres as of June 30, 1954.

miliar technique in public land distribution—it conferred upon the State the exclusive right for a predetermined period to select lands when they were restored to the public domain, that is, reopened to entry under the public land laws.[6] In § 6(g) of the Statehood Act it granted Alaska a preferred right of selection during a period of not less than 90 days upon revocation of any order of withdrawal.

Historic practice underlies these restrictions in §§ 6(b) and 6(g). In the words of Mr. Justice Van Devanter, who, as this Court has recognized,[7] wrote with special authority concerning the public land laws:

> "While the grant as extended to Minnesota was a grant in praesenti, it was restricted to lands which were then public. The restriction was not expressed, but implied according to a familiar rule. That rule is that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States,* 92 U.S. 733, 741, 745; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 119; *Scott* v. *Carew,* 196 U. S. 100." *United States* v. *Minnesota,* 270 U. S. 181, 206.[8]

Equally well-settled was the corollary doctrine that any attempt to create an interest or right in public

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[6] We have set forth in Appendix G, p. 53a *infra,* a table of other public land laws which grant to states or particular classes of individuals the preferential right to enter upon public lands for periods ranging from 60 days to 6 months after they are opened.

[7] *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336-337.

[8] This was already the rule in 1827. *Choiard* v. *Pope,* 12 Wheat. (25 U.S.) 587.

lands which is made before they are opened to disposition is null and void.[9]

It appears from the face of the Statehood Act that Congress made a deliberate choice in authorizing Alaska to select only from opened lands under the general purpose grant of § 6(b). By contrast, § 6(a) allows the State to select for community development up to 400,000 acres of national forest lands "which are vacant and unappropriated at the time of their selection"—omitting the additional requirement, found in § 6(b), that the lands be "unreserved" when selected. The legislative history shows that Congress understood the difference and that it deemed the most stringent limitation in § 6(b) to be necessary to prevent "any substantial interference with federal land programs." [10]

The unambiguous and purposeful conditions which Congress imposed in the Statehood Act are set at

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[9] The rule was forcefully stated by one of the Secretary's predecessors in *Smith* v. *Malone*, 18 I.D. 482, 485:

> "But there is nothing in all this which even by implication authorizes the entry of, or the initiation of entry proceedings so as to acquire any right thereunder, for lands not at that time subject to entry.
>
> "That this cannot be done may be asserted as a fundamental princip[le] in the administration of the land laws as old as the system itself * * * Authorities need not be cited for this statement, because the Department and the courts have invariably asserted the rule. And in all decisions bearing upon the subject, it is distinctly held that a right to acquire title to lands can only be initiated *after* they become subject to entry or sale."

[10] "With the exception of 400,000 acres of national-forest land, the State will not have the right to select lands which have been withdrawn from the public domain. Therefore, the grants to the new State will not cause any substantial interference with federal land programs instituted over the past many years." Sen. Rept. 1163, 85th Cong. 1st Sess. p. 2. See also House Hearings, op. cit. n. 5 *supra* pp. 244-246.

naught by the Secretary's award of the disputed lands to Alaska and its affirmance by the Court of Appeals. These lands were not "vacant, unappropriated and unreserved at the time of their selection", as § 6(b) prescribes, for they were still withdrawn by P.L.O. 576 on January 8, 1963 when Alaska, invoking § 6(b), selected them. And whereas the Secretary followed § 6(g) in P.L.O. 3022 by affording Alaska a preferred right of selection commencing April 8, 1963 ("Upon the revocation of [the] order of withdrawal"),[11] he flouted that provision in his decision, by honoring the selection Alaska made *before* that date. The District Court properly concluded, "The application filed by the State on January 8, 1963 was not a selection of the lands in accordance with * * * Section 6(g) of the Alaska Statehood Act", but was, rather, "a nullity" (p. 17a, *infra.*) But the Court of Appeals reinstated the Secretary's award, sanctioning Alaska's noncompliance with the procedures Congress had established, and rendering *them* "a nullity".

The Court of Appeals did not declare that the January 8 selection was valid; indeed, there is implicit in its opinion the acknowledgment that this selection was invalid. Rather, the Court ruled:

> "While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the

[11] As the District Court put it (p. 15a, *infra*), the "significance of P.L.O. 3022 is the fact that therein the Secretary, in clear and precise language, set forth his understanding of the requirements of section 6(g) of the Act." As the District Court also observed (pp. 12a-13a and 17a, *infra*), the regulations adopted by the Secretary pursuant to the Alaska Statehood Act were consistent with the statute, but not his decision herein. This, too, brings into play the *Accardi-Service* principle discussed at p. 16, *infra.*

> original land descriptions as well as applications for the selection of additional lands." (p. 4a, infra).

The holding that the Secretary was entitled to accept the amendments as a timely reassertion of Alaska's original application is in direct violation of the Secretary's own regulations regarding amendments. 43 C.F.R. § 1821.6-6 provides as follows:

> "Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections or locations, *amendments will not be allowed,* because such claims, being invalid, should be cancelled, and upon cancellation thereof a new entry, selection or location may be allowed as though the former had never been made." (Emphasis added.)

Even if there were no regulation which prohibited amendments of invalid selections, the letters filed by the State could not be treated as selections of the lands here involved because they did not comply with the form prescribed for that purpose. The most obvious discrepancy is that, as the Court of Appeals acknowledged, the amendments "did not include the land descriptions set out in the original application" (p. 4a, *infra*); but the regulations expressly require descriptions of all lands selected.[12]

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[12] The grant in § 6(b) of the Alaska Statehood Act is implemented by 43 C.F.R. §2222.9-4. Paragraph (c)(4) thereof states that "Lands selected must be described as provided by § 2222.9-3(c)," the pertinent subparagraph of which states, "If the selected lands are unsurveyed and are described by approved protraction diagrams of the rectangular survey system, such description is required." 43 C.F.R. § 2222.9-3(c)(1)(iv).

The letters also fail to conform to 43 C.F.R. §§ 2222.9-3(c)(1)(ii)(b), (d) and (e), and 2222.9-3(c)(2). Compare the letter at n. 1 *supra* with the regulations at pp. 45a-48a, *infra.*

Each of the regulations whose violation by the Secretary was condoned by the court below, had been promulgated pursuant to authority granted by statute[13] and hence has the force of law. "That it binds him [the Secretary] as well as others while it is in effect is not doubted." *Chapman* v. *Sheridan-Wyoming Coal Company,* 338 U.S. 621, 629. The *Sheridan-Wyoming Coal* case anticipated—and applied to regulations of the same character as are involved in this case—what is now a firmly settled principle of administrative law: "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service* v. *Dulles,* 354 U.S. 363, 372, following *Accardi* v. *Shaughnessy,* 347 U.S. 260. See also *Vitarelli* v. *Seaton,* 359 U.S. 535; *Williams* v. *Zuckert,* 371 U.S. 531, 372 U.S. 765. That principle is wholly inconsistent with the holding below that the Secretary's action in this case in accepting the amendments as a timely reassertion of Alaska's

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[13] The Secretary derives general authority to promulgate regulations in aid of the public land laws from 43 U.S.C. § 1201. Other laws are additional sources of authority for certain subjects, *e.g.* 43 U.S.C. § 697 dealing specifically with amendments and various provisions of the Alaska Statehood Act.

Since the Secretary's award also contravened Public Land Orders 576 and 3022, we note that these stand on an equal legal footing with his regulations.

Congress expressly confirmed the President's power to withdraw public lands from entry (see also *United States* v. *Midwest Oil Co.,* 236 U.S. 459), and he in turn has delegated that authority to the Secretary by Executive Order. See p. 10a of the District Court's opinion.

original application can be sustained as an exercise of his "discretion." The Secretary had discretion to determine the effect which is to be given amendments to applications; and § 6(g) of the Alaska Statehood Act expressly gave the Secretary discretion to formulate the procedures by which Alaska would make selections thereunder, consistent with the statute. But having exercised his discretion to promulgate these rules, he was not free, while they remained in effect, to award lands to one claimant and deny them to another in derogation of his own regulations.

Regulations such as these govern all claims pursued under the public land laws by entry, competitive bidding or otherwise—whether the rights asserted are to the lands themselves or to the mineral riches, including oil and gas, located thereon.[14] Particularly because of the Secretary's discretion over these resources, they constitute an indispensable control and protect the public interest in the fair and impartial allocation of the public domain. It is the high function of the *Accardi-Service* principle to subject administrative officials to the rule of law, adherence to which is imperative in the disposition of the vast wealth over which Congress has given the Secretary control.

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[14] See, in addition to the laws cited in n. 13, *supra*, *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 text and note at n. 6. A further example of the pervasive scope of such regulations is section 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337, authorizing the Secretary to grant leases to "the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance." See *Union Oil Company Bid on Tract 228, etc.*, 75 I.D. 147, set aside *sub nom. Superior Oil Co.* v. *Udall*, D.C.D.C. 1521-68, unreported order, appeal pending C.A.D.C. Nos. 22, 192 and 22, 194.

II. The Decision Below Seriously Undermines the Administration of the Public Land Laws.

The magnitude and potential wealth of the territories affected by the decision below afford it unique importance. On December 11, 1968, the Secretary of Interior announced a proposal to withdraw from appropriation until December 31, 1970 "all unreserved public lands in Alaska" to protect the rights and interests therein of the native tribes.[15] Their disposition would thereupon be subject to the preference granted in § 6(g) with respect to lands restored from withdrawal. If the decision below is permitted to stand, Alaska would be free to select many millions of acres while they are reserved. In short, the vast remaining grant would be distributed, if the State chose, according to the procedures authorized by the Secretary in this case, rather than those prescribed by Congress.

The decision below would not only disturb the balance which Congress established between the interests of the State and other potential claimants by giving the State only a *limited* preference; it would have seriously

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[15] 33 F.R. 18591, par. 2 and 5.

At this writing, the withdrawal order has not issued, but the preliminary steps required by 43 C.F.R. § 2311 have been undertaken. On December 11, 1968 the Secretary approved the filing of an application for withdrawal by the Commissioner of Indian Affairs, 33 F.R. 18591, and on December 28, a notice inviting comments thereon by January 15, 1969 was published, 33 F.R. 19955.

In correspondence with the Governor of Alaska and the Chairman of the Senate and House Interior Committees explaining his approval of the application, the Secretary clearly expressed his intention to issue the withdrawal order. Department of the Interior Press Release, Dec. 11, 1968. It is, however, possible that his successor will take a different view. Even then, however, vast areas in the State would be in a state of withdrawal and their disposition governed by the law of this case.

adverse consequences on the formal administration of the land laws.

We have noted that the Statehood Act follows historic practice in permitting selections to be filed only upon lands which are open to entry. One reason that premature applications are given no effect is that they "would necessarily introduce confusion, uncertainty and irregularity in the local offices of the Land Department," *Lansdale* v. *Daniels,* 100 U.S. 113, 116. The Secretary's action would have precisely that effect, for while acknowledging the validity of the principle he disregarded it herein. Noting that "the State is the only applicant whom the land office permits to file 'prematurely' ", he concluded that there is "no likelihood that other applicants will clutter the records with their filings" (pp. 33a-34a, *infra*). This is a truly striking instance of administrative boot-strapping: The land office's "practice" of giving special treatment to the State—which is itself unauthorized and contrary to precedent[16]—is asserted as eliminating the need for, and thereupon as justifying noncompliance with, a procedure expressly mandated by Congress! But putting aside questions of *power,* the Secretary's reasoning is demonstrably unsound, for

[16] "If one person can maintain an application for land not available for leasing several or a hundred can." *J. G. Hatheway, et al.,* 68 I.D. 48, 52 quoted approvingly by the Secretary in this case, p. 31a *infra.* The principle has been applied with full vigor to deny effect to state selections filed on withdrawn lands, e.g. *Campbell* v. *Jackson,* 17 I.D. 417; *William Herth,* 22 I.D. 385; *Benson* v. *Idaho,* 24 I.D. 272; *Zeigler* v. *Idaho,* 30 I.D. 1, even where, as in *Zeigler* and the present case, the State enjoyed a preferred right of selection as soon as the lands became subject to entry.

the State alone would "clutter the records" of the land office by claiming even a small fraction of the lands to which it is ultimately entitled. And this "undue burden on the land office" (id.) would be particularly acute during the two years in which the Secretary proposes to reserve from settlement all public land in Alaska—on any of which the state could file under the decision in this case—although it could not do so if the Statehood Act were obeyed.

The adverse impact of the decision extends beyond the borders of Alaska, for it affects the operation of the system of land management as a whole. By awarding the disputed lands without regard to the requirements of his own regulations, the Secretary has undermined their reliability and consequently their utility. The indispensible role which the Department's procedural regulations fulfill in the administration of the public land laws is that they instruct prospective applicants how to perfect claims and advise them whether their claims have been anticipated by a prior valid application. The present case illustrates how these beneficent objectives are frustrated when the regulations are cast aside. In the Court of Appeals' view, petitioners suffered no prejudice by the Secretary's award of the lands to Alaska "inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims." But since that notice informed petitioners only that Alaska had made claims which were invalid under the applicable law—that is, the Alaskan Statehood Act and the regulations—they were entitled to include that the lands remained open and that their own entry under the public land laws would

be honored.[17] Such prejudice is not unique to this case; it is the inevitable consequence of any decision which permits the Secretary to disregard his regulations in adjudicating conflicting claims. Records and notices derive meaning only from the context of the law in effect at the time a claim is made; they are useless, or actively misleading, if that law does not control its ultimate disposition. The resulting uncertainty invites controversy and defeats the even-handed distribution of the public lands according to Congressional policy.

An even more devastating blow to these central objectives of land management was rendered by the Court of Appeals' novel holding that Alaska was entitled to the land because it "intended [its] amendment as a reassertion of the original land description" (p. 4a, *infra*). We are aware of no prior decision holding that a claimant can obtain rights in public lands by virtue of his intent—although he failed to manifest that intent by following the procedures prescribed by law.

The intent factor is wholly irrelevant to any proper legal consideration. If good intentions can excuse noncompliance with procedural regulations, these will promptly pass into disuse. And the necessity to evalu-

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[17] The notice declared that the State "*on January 8, 1963, and subsequent amendments thereto,* filed application Anchorage Serial 058566, for certain public lands * * * more particularly described as follows. * * *." (Emphasis supplied.) The notice described *subsequent amendments thereto,* filed application Anchorage Serial the lands which petitioners ultimately claimed, but did not assert that these had been selected on any date other than January 8. In legal terms, the notice meant that Alaska had made no valid selection of these lands, either on January 8, because they were not then "vacant, unappropriated or unreserved" as the Act required, or by the amendments, for none were permitted by the regulations.

ate intent would seriously impede the administration of the public land laws. If the choice between conflicting claimants is to turn on the intent of one or both of them, it will rarely be possible to resolve them on the basis of the formal applications, papers and notices which the regulations prescribe; evidentiary hearings are usually required where intent is in issue. Cf. *Poller* v. *CBS,* 368 U.S. 464. Such hearings would add greatly to the expense of entry proceedings, thereby discouraging prospective applicants, particularly under such laws as the homestead laws where the potential rewards are limited. Such hearings would also delay decision and, inevitably, occupancy and development of the lands. The central objective of public land management is the speedy and inexpensive distribution of the lands which Congress has made available to the public. A rule of law which necessitates evidentiary hearings before title to the lands can pass defeats that objective. A further undesirable characteristic of the intent factor is its inherent uncertainty. Unless their formal filings are deemed conclusive manifestations of the parties' intent—which is the precise opposite of what the Court of Appeals did here—inspection of those records will not reveal the status of the lands. We submit that the concept of intent is so potentially destructive of the orderly and even-handed administration of the public lands that this Court should uproot it now, on its first appearance.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,629

STEWART L. UDALL, *Secretary of the Interior,*
STATE OF ALASKA, *Appellants,*

vs.

ANDREW J. KALERAK, JR., ARMAND C. SPIELMAN, RONALD L. THIEL, RAY MCCUBBINS, LAWRENCE MCCUBBINS, CARL B. FISCUS, C. H. TROMBLEY, ARVIL GARY TAYLOR, PEARL GINGERICH, *Appellees.*

[June 19, 1968]

Appeal from the United States District Court
for the District of Alaska

Before: HAMLEY and DUNIWAY, Circuit Judges, and BYRNE,* District Judge

HAMLEY, Circuit Judge:

Andrew J. Kalerak, Jr. and eight other individuals brought this action in the district court to set aside a decision of the Secretary of the Interior rejecting their individual applications for certain tracts of land in the federal public domain in Alaska. Stewart L. Udall, Secretary of the Interior (Secretary) was named defendant, and the State of Alaska was thereafter permitted to intervene as an additional defendant. The facts are not in dispute. Both sides moved for summary judgment. The district court granted plaintiffs' motion and defendants appeal.

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* The Honorable William M. Byrne, Senior United States District Judge for the Central District of California, sitting by designation.

Under section 6(b) of the Alaska Statehood Act of July 7, 1958 (Act), 72 Stat. 339, 48 U.S.C. ch. 2, § 6(b), (1964), Alaska is permitted to select over a twenty-five year period after its admission into the Union, up to 102,550,000 acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection. This litigation concerns a conflict between Alaska's claim to certain of these public lands, sought to be selected pursuant to section 6(b), and plaintiffs' claims to the same lands based upon their respective notices of location of settlement or occupancy for homestead purposes.

On March 29, 1949, by Public Land Order 576, 14 F.R. 1614, the United States withdrew the lands in question from appropriation. On January 8, 1963, while the lands were still withdrawn from appropriation, and therefore not available for selection by the state under section 6(b), Alaska filed with the local land office of the Federal Bureau of Land Management (land office), its application No. A-058566 for the selection of 26,880 acres of land as part of its section 6(b) allotment, such selection including the lands in question. The selection was posted in the appropriate land and status records.

On April 8, 1963, by Public Land Order 3022, 28 F.R. 3661, the Secretary revoked the withdrawal of the land and released it for appropriation. Pursuant to section 6(g) of the Act, this order provided that Alaska be given a ninety-day preference period (to July 8, 1963) to claim the land. During the ninety-day period Alaska did not file a new application for the selecting of the 26,880 acres of land (including those here in question) which were described in its application of January 8, 1963.

Within that period, however, Alaska filed with the land office two letters requesting that its original application No. A-058566 be amended to embrace certain described lands, none of which were described in the original application. These letters were filed on April 8 and May

24, 1963. After the expiration of that ninety-day period, Alaska filed in the same office two more letters (March 16 and 17, 1964), making similar requests with respect to other lands not described in any of the previous applications.

On October 8, 1964, the land office directed that Alaska publish a notice of its application in an Anchorage newspaper for five consecutive weeks. The publication was carried out within the time allowed and described all lands applied for, including those described in the original application.

Between May 27 and June 17, 1965, Kalerak and the other plaintiffs sought to file with the land office their Notice of Location of Settlement or Occupancy Claim. The land office refused to accept plaintiffs' notices for recordation. The Bureau of Land Management, on appeal, reversed the decision of the land office. The Secretary, in an appeal by Alaska, reversed the decision of the Bureau of Land Management, thereby restoring the decision of the land office that the tendered notices of the plaintiffs should not be filed. The district court judgment here under review, in turn, reversed the decision of the Secretary, thereby holding that plaintiffs' claims to the lands in question should prevail over Alaska's claim.

In connection with the problem arising from the fact that Alaska's original application for selection was filed at a time when the lands were withdrawn from selection, the Secretary held, alternatively:

(1) Whether or not Alaska's original selection was defective because made with reference to lands which were then withdrawn, it nevertheless accomplished a segregation of those lands such that they were not subject to applications and appropriations under the public land laws, the result being that plaintiffs' claims for settlement or location, made while such segregation was in effect, were invalid; and

(2) Alaska's four amendments of its original application for selection, made after the withdrawal of the lands had been revoked, amounted to a re-application for selection of the lands described in the original application, the result being that plaintiffs' claims, subsequently tendered for filing, were properly rejected.

The district court declined to accept either of these rulings by the Secretary.

In our opinion the district court erred in failing to accept the second of these rulings. While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original application (referring thereto by number), rather than by new applications, (2) the amendments referred to "additional open lands," indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application.[1]

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[1] We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

Apart from plaintiffs' challenge to Alaska's claim based on the circumstance that the lands were withdrawn at the time of the original application, plaintiffs argue that since Alaska sought the lands in question to assist the City of Anchorage in protecting its water supply, its selection was invalid because in violation of the alienation prohibition of section 6(g) of the Act and in derogation of the Equal Protection Clause of the Fourteenth Amendment.

On March 8, 1962, the City of Anchorage made a request of the land office that the lands in question be withdrawn for watershed purposes. In a letter dated September 28, 1962, addressed to the State Division of Lands, the state office of the Bureau of Land Management stated that the city was not a proper applicant. In this letter it was also suggested that the state might file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for watershed purposes. Responsive to this suggestion the state filed its application of January 8, 1963, for the selection of 26,880 acres of public land.

In arguing that, under these circumstances, Alaska's selection of these lands is in violation of section 6(g), plaintiffs call attention to the provision of that section that:

> "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State of Alaska."

The Secretary rejected this contention, holding that there was no evidence to support the charge that Alaska had, or intended to, alienate or bargain away its section 6(b) power to select public lands. The district court expressed no view on this point.

We are in agreement with the Secretary. The selection was made by Alaska in its own name and, insofar as the

record shows, not subject to any contract, conveyance or other transaction with the City of Anchorage. The lands in question were initially subject to Public Land Order No. 576, 13 F.R. 1614, for the protection of the water supply of the Anchorage area. The steps thereafter taken by Alaska, as described above, were designed and intended to fulfill this intent. The fact that the interests of the state and of its political subdivision, the City of Anchorage, coincide, is without legal significance and, on this record, in no sense evidences a violation of the prohibition against alienation contained in section 6(g).

With regard to its equal protection argument, plaintiffs note that, under section 6(a), Alaska is permitted to select some 800,000 acres of land for the purposes of furthering the development and expansion of its communities. In view of this provision, and of the limitation upon the number of acres Alaska is entitled to select under section 6(b), plaintiffs contend that Alaska's intent to use the lands here in question to protect Anchorage's water supply discriminates against the rest of the state and the citizens thereof.

Neither the Secretary nor the district court discussed this argument. We conclude that it is without merit. The purpose of the land grants under the Act is to serve Alaska's overall economic and social well-being. Some of the lands so selected will probably be used to protect mineral deposits. Others will safeguard wildlife. Still others will be used to protect domestic water supplies. The lands in question fall in the latter category and are designed to serve the most populous area of the state. No deprivation of the equal protection of the laws is remotely involved.

Reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A-35-66 Civil

ANDREW J. KALERAK, JR., ARMAND C. SPIELMAN, RONALD L. THIEL, RAY MCCUBBINS, LAWRENCE MCCUBBINS, CARL B. FISCUS, C. H. TROMBLEY, ARVIL GABY TAYLOR, PEARL GINGERICH, *Plaintiffs,*

vs.

STEWART L. UDALL, *Secretary of Interior,*
STATE OF ALASKA, *Defendants.*

Memorandum of Decision

The plaintiffs seek judicial review of the final decision of the Secretary of the Department of Interior file January 20, 1966.

This court has authority to review the Secretary's decision under the Administrative Procedure Act, 5 U.S.C.A. § 1001, et seq.; *Adams* v. *Witmer,* 271 F.2d 29 (9th Cir. 1959); and *Denison* v. *Udall,* 248 F. Supp. 942 (D. Ariz. 1965).

The scope of the review authorized by the Administrative Procedure Act is whether the agency's action, findings and conclusions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. *Cf. Coleman* v. *United States,* Opinion No. 20,227, United States Court of Appeals for the Ninth Circuit, June 21, 1966.

On January 8, 1963, while the land here involved was withdrawn from all forms of appropriation by virtue of PLO 576, dated March 29, 1949, 14 Fed. Reg. 1614, an application for selection of such land was filed with the Anchorage Land Office by the State of Alaska.

On April 8, 1963, the Secretary of Interior issued PLO 3022, 24 Fed. Reg. 3661, revoking the withdrawal established by paragraph (4) of PLO 576, *supra.*

During the 90 day period from April 8, 1963, until 10:00 a.m. on July 8, 1963, no selection of the lands involved in this case was made by the State. During the 90 day period the State did amend its application but such amendments merely added to the land described in the January 8, 1963, application and did not mention the land that is here in controversy.

On May 27, 1965, more than 22 months after the expiration of the preference period granted the State by section 6(g) of the Alaska Statehood Act, Andrew Kalerak, Jr., and others filed notices of location of settlement or occupancy claims with the Anchorage Land Office.

Subsequent to the date of the filing of Kalerak's location notice, the State top-filed a blanket selection, Serial No. 062905, over the same area as its first filing, including the area embraced by Kalerak's location notice.

On June 9, 1965, by a letter-decision, the Land Office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it included lands described in paragraph (4) of PLO 576, *supra,* and reversed the Land Office decision insofar as it refused to accept the notice of location for recording.

On appeal to the Secretary of Interior the Secretary, on January 20, 1966, reversed the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, and affirmed the decisions of the Land Office refusing the several notices of occupancy or settlement.

The Secretary in his decision of January 20, 1966, apparently relying on section 76.16 of 43 C.F.R., concluded that the selection filed by the State on January 8, 1963, which was accepted by the Land Office and posted on the public land record, segregated the land from all appropriations based on settlement and location so long as it remained of record, despite the fact that the selected land was in a withdrawal at the time the State filed its selection.

In his decision the Secretary recognized the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. However, he concluded that the rule against premature filings was adopted for administrative convenience and to insure equality of opportunity to file and where these considerations were not present, amendments to a premature application filed by the State during a statutory preference right period could thereafter be accepted as reaffirmations of the original filing and treated as though the State had refiled its original application at the time of the amendments.

The facts are not in dispute. The parties have each moved for summary judgment on the grounds that there is no genuine issue as to any material fact and that judgment should be entered as a matter of law.

The issues for determination are, (1) whether the application for selection filed by the State of Alaska on January 8, 1963, insofar as it embraced lands withdrawn by PLO 576, *supra*, was a valid selection in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709, 48 U.S.C.A. § 46-3b), and § 6(g) of the Alaska State-

hood Act of July 7, 1958 (72 Stat. 339), hereinafter referred to as the Act, and the regulations in 43 C.F.R. part 76; and (2) whether the State's application of January 8, 1963, segregated the land involved and effectively closed the land to subsequent appropriation.

The function of judicial review of administrative orders is a dispassionate and disinterested adjudication unmixed with any concern as to the success of any of the respective parties. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 640-641 (1950).

The Act of June 25, 1910, (36 Stat. 847; 43 U.S.C.A. § 141) provides as follows:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and *such withdrawals* or reservations *shall remain in force until revoked by him or by an act of Congress.*" (Emphasis supplied.)

Executive Order No. 9337 of April 24, 1943, subsequently superseded by Executive Order No. 10355 of May 26, 1952, authorized the President to delegate to the Secretary of the Interior the authority vested in him by 43 U.S.C.A. § 141.

As stated above, by PLO 576, *supra*, the lands here in controversy were withdrawn from all forms of appropriation under the public land laws. Lands which have been withdrawn for a lawful purpose are not public lands and are to be regarded as excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. The withdrawal created by PLO 576 therefore remained in force until revoked in part by PLO 3022 on April 8, 1963.

The Alaska Statehood Act, supra, provided for the admission of the State of Alaska into the Union. Section 4 of the Act provided in part:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, ...

Section 6(b) of the Act provides:

> The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within 25 years after the admission of Alaska into the Union, not to exceed 102,550,000 acres from the *public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection:* . . . (Emphasis supplied.)

Section 6(g) of the Act provides as follows:

> *Upon* the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective, . . . *during which period* the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act . . . . (Emphasis supplied.)

It is readily apparent that section 6(b) and section 6(g) of the Act deal with two vastly different and distinct types or classes of land. Section 6(b) pertains to public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selec-

tion, while section 6(g) pertains to lands which have been withdrawn from all forms of appropriation under the public land laws.

Congress in section 6(g) has stated in clear and unambiguous language that where the land has been withdrawn that *upon* the revocation of the order of withdrawal the State shall have not less than 90 days, *during which period* the State shall have a preferred right of selection. Where, as here, Congress has expressed itself in clear and unambiguous language it must be held to have meant what it plainly expressed.

Nothing is contained in the legislative history of the Act that would indicate that Congress intended that the State, with respect to withdrawn lands, should have any right of preference greater than that expressly set forth in section 6(g). U.S. Code Cong. & Ad. News, 1958, Vol. 2, pp. 2933-3009.

43 U.S.C.A. § 1201 provides that:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

Acting pursuant to this authority the Secretary prescribed certain regulations and published the same in the Federal Register on June 9, 1959, 24 Fed. Reg. 4657.

Section 76.15 of 43 C.F.R. provides in pertinent part as follows:

> (a) The acts of July 28, 1956 (see § 76 , and July 7, 1958 (see § 76.11), provide that upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes

> effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, ...

The language in this regulation is for all intents and purposes identical to that contained in section 6(g) of the Act. The words "upon" and "during which period" are words of common usage and understanding and have no obscure or hidden meaning.

Section 76.16 of part 43 C.F.R. in substance provides that lands desired by the State will be segregated from all appropriations when the State files its application for selection in the appropriate land office. This regulation is valid insofar as public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection are concerned. The regulation does not, however, apply to lands that are withdrawn from all forms of appropriation under the public land laws such as those involved in the present case. To so hold would be to add to section 6(g) something vastly different than that expressed or intended by Congress. This would be a distortion of congressional intent rather than an interpretation.

The regulations of an agency of the United States must be within the powers conferred by Congress. If the agency regulations go beyond what Congress has authorized, they are void. *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 355 F.2d 255 (9th Cir. 1964). To extend the segregative effect of section 76.16 of C.F.R. to withdrawn lands as well as to vacant, unappropriated and unreserved lands, would result in a preference right far beyond that contemplated or authorized by Congress in section 6(g) of the Act and would therefore be void.

There is no safer nor better canon of interpretation than that when language is clear and unambiguous it must be

held to mean what it plainly expresses. *Cf. Easson* v. *C.I.R.*, 294 F.2d 653 (9th Cir. 1961).

It is evident that the Secretary of the Interior experienced no difficulty in understanding the meaning and intent of section 6(g) of the Act and section 76.15 of 43 C.F.R. On April 8, 1963, the Secretary issued PLO 3022, 28 Fed. Reg. 3661, revoking the withdrawal made by paragraph (4) of PLO 576.

PLO 3022, in pertinent part, provides:

> By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is hereby ordered as follows:
>
> 1. Public Land Order No. 576 of March 29, 1949, so far as it withdrew in paragraph numbered four thereof, an area of approximately 17,800 acres in Tps. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, for the protection of the water Supply of the city of Anchorage, is hereby revoked.
>
> • • • •
>
> 3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:
>
> a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. Part 76.
>
> • • • •
>
> 5. The lands will be subject to the operation of the public land laws generally, including location under

> the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. . . .

Whether it is appropriate to say that PLO 3022 is the contemporaneous and practical interpretation given section 6(g) of the Act is of no consequence. The significance of PLO 3022 is the fact that therein the Secretary, in clear and precise language, set forth his understanding of the requirements of section 6(g) of the Act.

In *Udall* v. *Tallman,* 380 U.S. 1 (1965), the Supreme Court of the United States, in discussing the interpretation of executive and public land orders by the Secretary of the Interior, stated as follows (at p. 4):

> The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. . . . (Citations omitted.)

The Court also stated (at p. 16):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." . . . . (Citations omitted.)

The Court quoted from its earlier decisions in holding (at pp. 16-17):

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with

the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " (Citation omitted.) When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." . . . . (Citation omitted.)

The Secretary's construction, interpretation or statement of his understanding of the express purpose and intent of section 6(g) of the Act and the regulations in 43 C.F.R. part 76, as evidenced by PLO 3022, is the only reasonable one and is wholly consistent with the Act and regulations. It should therefore be controlling, as to the issues to be determined in this case, on this court and the subordinate officials of the Department of Interior.

Had the Secretary thought that section 76.16 of part 43 C.F.R. segregated the lands desired by the State from subsequent appropriation as of the time when the State filed its application for selection, he most assuredly would not, on April 8, 1963, have (1) ordered the lands opened to settlement subject to a 90 day preferred right of selection on the part of the State; (2) ordered that from April 8, 1963, until 10:00 a.m. on July 8, 1963, the State of Alaska had a preferred right to select the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76; or (3) ordered that

beginning at 10:00 a.m. on July 8, 1963, the lands would be subject to the operation of the public land laws generally, including location under the United States mining laws.

Regardless of any reliance that the State may have placed on the Bureau of Land Management's interpretation of the statute and applicable regulations prior to April 8, 1963, no reason existed from that day forward to justify reliance on the practices, understanding, notices, agreements or interpretation which existed between the City, the State and the Bureau of Land Management. Section 6(g) of the Act, section 76.15 of the regulations and the provisions of PLO 3022 specifically and clearly spelled out what steps the State was required to take to obtain a preferred right of selection and the precise period of time within which such right had to be exercised. In view of this, the State cannot seriously contend that it was not necessary for it to comply with the law and to exercise its preferred right of selection during the 90 day period afforded it between April 8, 1963, and 10:00 a.m. on July 8, 1963.

The court concludes as follows:

1. The application filed by the State on January 8, 1963, was not a selection of the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76.

2. The application filed by the State on January 8, 1963, was at the most only a request that paragraph 4 of PLO 576 be revoked and the application did not segregate the land from subsequent appropriation.

3. The State did not exercise the preferred right of selection afforded it by section 6(g) of the Act, section 76.15 of part 43 C.F.R. and PLO 3022.

4. The application filed by the State on January 8, 1963, was a nullity. The so-called amendments, or additional selections during the 90 day period, which did not embrace the lands selected on January 8, 1963, did not serve to validate the prior void selection.

5. Beginning at 10:00 a.m. on July 8, 1963, the lands became subject to the operation of the public land laws generally, including location under the United States mining laws.

6. Thereafter the plaintiffs' notices of location or occupancy were duly tendered for filing and should now be accepted for recordation.

7. The decision of the Secretary of the Interior filed on January 20, 1966, is not in accordance with law and, under the circumstances reflected by the administrative record, is arbitrary and capricious; in excess of statutory authority and limitations and short of statutory right; and without observance of precedure required by law, and should be set aside.

Accordingly, counsel for plaintiffs, within 15 (fifteen) days from the date of this memorandum of decision, shall prepare, serve and submit for the court's approval an appropriate form of summary judgment reversing the decision of the Secretary of the Interior filed January 20, 1966, and remanding this matter to the Manager of the Anchorage District Land Office for proper recordation on the records of the Land Office and for other action as is necessary to establish the prior claim of the plaintiffs herein for homestead entry and location and trade and manufacturing entry and location, and that such be accepted for recordation in such office and that the decision of the Chief of the Office of Appeals and Hearings of the Bureau of Land Management be affirmed in all regards.

Although certain assertions appearing in the record did not enter into the court's consideration of the merits

of the case, the court makes the following comments with reference thereto.

It is asserted that the State is being deprived of its preferred right by a mere technicality. It appears to the court that a more accurate statement would be that this right was lost by the failure of the State to exercise the right in the manner required by law.

It is also asserted that the State and City of Anchorage will lose irreplaceable watershed land on the basis of what might be considered, at the most, slightly irregular procedure. This is regrettable, if true, but it is not a factor which the court can properly consider in determining the issues presented. It would seem that if, in fact, the lands are necessary for an essential public use or purpose, the State, under its power of eminent domain, as it presently exists, or under appropriate legislative amendments, could acquire the land for watershed purposes.

RAYMOND E. PLUMMER
United States District Judge

Dated and entered: Oct. 20, 1966
Copies mailed to:
Messrs. Hughes, Thorsness & Lowe
Richard L. McVeigh, U. S. Attorney
Theodore E. Fleischer, Asst. Attorney General

Filed October 20, 1966,
J. M. KRONINGER, Clerk.

APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20240

A-30518: Anchorage 058566, 062515

State of Alaska: State selection rejected

Andrew Kalerak, Jr.: Reversed

Appeal From the Bureau of Land Management

The State of Alaska has appealed to the Secretary of the Interior from a decision dated July 20, 1965, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, rejecting in part its selection application Anchorage 058566 and reversing a decision dated June 9, 1965, of the Anchorage district and land office refusing to accept for recordation a notice of location of a settlement, Anchorage 058566, submitted by Andrew Kalerak, Jr., for lands in conflict with the State's selection.

In addition, Ray W. McCubbins and 10 others have also appealed to the Director of the Bureau of Land Management from letter decisions of the Anchorage district and land office refusing to accept their respective notices of settlement or occupancy claims.[1] Because in our view the

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[1] The names of the applicants, serial numbers, and type of claim are as follows:

	Anchorage		Date Received
Ray W. McCubbins	062524	Homestead	May 28, 1965
Lawrence McCubbins	062558	Homestead	June 7, 1965
*Carl B. Fiscus	062609	Homestead	June 7, 1965
Lawrence J. Wolfgram	062614	Trade & Mfg. Site	June 11, 1965
Lawrence J. Wolfgram	062622	Homestead	June 14, 1965
Ronald L. Thiel	062624	Trade & Mfg. Site	June 14, 1965
Ronald L. Thiel	062625	Homestead	June 14, 1965
Armand C. Sipielman	062627	Homestead	June 15, 1965
Arvil Gary Taylor	062629	Homestead	June 15, 1965
Gerald Baxter	062639	Homestead	June 16, 1965
C. H. Trombley	062649	Homestead	June 17, 1965

* Fiscus filed a relinquishment of his claim on December 6, 1965.

legal issue governing the disposition of the case on appeal to the Secretary is the same as that in the cases on appeal to the Director, they will be considered and decided with the pending appeal.[2]

The lands selected by the State, a small part of which is also sought by the individual applicants, cover approximately 20,000 acres in Ts. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, Alaska, most of which had been withdrawn by paragraph (4) of the Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, from all forms of appropriation for the protection of the water supply of the City of Anchorage.

The attempt to transfer the selected lands from the Federal Government to the State began, apparently, with a request of March 8, 1962, of the City of Anchorage to the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for watershed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of P.L.O. 576 and, when that was done, the State selection would become effective immediately.

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[2] The Secretary of the Interior may in the exercise of his supervisory authority assume jurisdiction over a case pending on appeal before the Director of the Bureau of Land Management without awaiting a decision by the Director and a subsequent appeal from that decision. *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *U. S.* v. *M. V. Browning, Administrator*, 68 I.D. 183 (1961).

The Director of the State Division of Lands informed the land office on January 8, 1963, that the suggested plan was agreeable to the State and the city. On the same day the State filed a formal selection application, A-058566, pursuant to section 6(b) of the act of July 7, 1958, 72 Stat. 739, 48 U.S.C. pp. 9025, 9026,[3] for 26,880 acres of public land.[4]

In accordance with the regular practice the State's selection was posted in the appropriate land and status records.

On April 8, 1963, the Department issued P.L.O. 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of P.L.O. 576, *supra*. The order also provided:

> "3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:
>
> a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.
>
> b. All other valid applications and selections under the nonmineral public lands laws including applications and offers under the mineral leasing laws for those lands described in Paragraph 1 hereof, presented

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[3] Section 6(b) granted to the State and entitled it to select not more than 102,550,000 acres from the public lands which are "vacant, unappropriated, and unreserved at the time of their selection."

[4] In the next 14 months the State filed four amendments adding tracts of various sizes to its selection application. April 8, 1963—950 acres; May 24, 1963—640 acres; March 13, 1964—3,777 acres; March 17, 1964—certain lands restored by P.L.O. 314, 29 F.R. 1327.

at or prior to 10:00 a.m. July 8, 1963, will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.

4. Persons claiming preference rights based upon valid settlement, statutory preference, or equitable claims must enclose properly corroborated statements in support of their applications, setting forth all facts relevant to their claims.

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. The lands described in Paragraph 2 hereof, have been open to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Anchorage, Alaska."[5]

On October 8, 1964, the land office issued a decision directing that the State publish a notice of its application in an Anchorage newspaper for five consecutive weeks.[6]

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[5] Section 6(g) of the act of July 7, 1958, *supra*, states in part:

"The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act * * *."

[6] The decision stated:

"* * * The selected lands are of a class subject to selection under the Act [sec. 6(b) of the act of July 7, 1958, *supra*] * * *.

"The selected lands are now segregated from all appropriations under the public land laws. This segregation will automatically terminate unless the State publishes first notice of its application within 60 days of receipt of this decision (43 CFR 76.16) [now 43 CFR 2013.9.4]."

The publication was carried out within the time allowed, the notice stating:

> "Notice is also given that the above described lands have, since these dates [the dates on which the original application and amendments were filed], been segregated from all applications and appropriations under the public land laws, including settlement under the homestead and similar laws and locations under the mining laws. Settlements and locations initiated on or after these dates are null and void."

About 7 months after first publication, Andrew Kalerak, Jr., on May 27, 1965, filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW¼ sec. 19, T. 12 N., R. 2 W., S.M., Alaska. Kalerak completed Item 5 of the form, which begins: "Improvements on the lands * * *," by inserting: "None, when I settled. I have staked each corner, marked the boundaries, post [sic] the land with a copy of this notice, and placed cement blocks on the land for a start of a foundation."

On June 9, 1965, by a letter-decision the land office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it includes lands described in paragraph (4) of P.L.O. 576, *supra,* and reversed the land office decision insofar as it refused to accept the notice of location for recording.

The decision held that on the date that the State filed its original selection application the land described in paragraph (4) of P.L.O. 576, *supra,* was still withdrawn,

that section 6(b) of the act of July 7, 1958, permits selections only from vacant, unappropriated and unreserved land, that on the filing date these lands were not eligible for selection, and that an application filed while land is withdrawn is invalid. The restoration of the lands by P.L.O. 3022, *supra,* it continued, was not effective retroactively, and when the State did not file a new application, or amend its original application to select the lands after they had been restored either during the preference period or thereafter, the lands became available for other application and settlement at the end of the preference period, which was 10:00 a.m. on July 8, 1963. Therefore, it concluded, the land embraced in Kalerak's claim was open to homestead settlement.

The State in its appeal to the Secretary contends that (1) the State relied on the Bureau of Land Management's interpretation of the applicable statute and regulations and that these interpretations can be relied upon and will be accorded great weight by the courts, (2) the State's selection, even if ineffective when filed, is to be considered as filed as of the time the land was opened to entry, and (3) the State can exercise the preference right given it by section 6(g) of the Statehood Act, *supra,* for land unavailable when the State files, to take effect when the land becomes available.

Kalerak, in opposition, maintains that the interpretation of the statute and regulations by the local Bureau office permitting blanket selections of lands whether available or not is erroneous and that no selections could be made of lands withdrawn by P.L.O. 576 while it was in effect, that the State has not established an administrative interpretation of the statute which is controlling, and that an agreement between the local Bureau office and the State cannot bind or stop the Secretary from making his own independent examination of the merits of the local post office practice, that P.L.O. 3022 did not allow the States to file prior to the revocation of P.L.O. 576 and, finally, that the

State, by making the selection on behalf of the city, has violated the prohibition in 6(g) of the Statehood Act, *supra,* which provides that:

> "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State."

Although the issue on appeal to the Secretary has become the validity of the State's selection insofar as it covers lands formerly in P.L.O. 576, the issue on appeal to the Director in the *Kalerak* case was, and in the 11 other cases being considered here is, whether the notices submitted by the settlers and other appellants should have been accepted for recordation by the land office. The land office refused to accept the notices on the ground that the land described in each of them was segregated by the State selection from all applications and appropriations under the public land laws, including the mining laws. The pertinent regulation provides for the return of the filing fee required to accompany a notice of settlement claim "where the notice is not acceptable to the land office for recording because the land is not subject to homestead settlement." 43 CFR 2211.9-1(d).[7]

As far as Kalerak and the other individual applicants are concerned, the issue is whether the land was subject to homestead settlement or to occupancy as a trade or manufacturing site. They contend that the State's selection is defective because it was filed prematurely, and, that, as a result, the State selection erected no obstacle to their attempts to establish their claims. In other words, they base their position upon the premise that a defective State selection cannot close the land selected to later appropriation.

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[7] Essentially the same provision is found in the homesite and headquarters site regulation, 43 CFR 2233.9-2(e), and in the trade and manufacturing site regulation, 43 CFR 2213.1-1(d).

Before examining the validity of the State's selection, we will first consider the soundness of the individual applicants' premise.

At the time the State first filed its selection the pertinent regulation described the effect of the State's action as follows:

> "Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9(a)(3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management."[8]

The regulation requires only that the State describe the lands properly to bring into play the segregative effect of its filing; it does not demand that the lands applied be available for filing, that they be eligible for selection, or that the selection be finally carried to patent. The regulation is merely a formal restatement of a rule that the Department has long followed. Keeping in mind that the land office treated the State selection as regular, accepted it, recorded it, and posted it, we find that the Department has held:

> "* * * the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, * * * has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other

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[8] 43 CFR, 1964 rev., 76.16; now with minor changes 43 CFR 2222.9-5(b).

> than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications * * *." *State of New Mexico* (on petition) 46 L.D. 217, 222 (1912), overruled on other grounds by Administrative Order, 48 L.D. 97, 98 (1921); Circular 768, 48 L.D. 172 (1921).

In a later decision in a case involving a school land indemnity selection, in which after filing it developed that the State had tendered defective base land, the Department reviewed its prior rulings and concluded:

> "The effect of filing and allowance of a school land indemnity selection is to segregate the land selected, even though it may thereafter be found that there are defects which render cancellation necessary, and such a selection, even though erroneously received, segregates the land so that no other application therefore may be received or rights initiated by its tender." *State of Arizona,* 55 L.D. 249 (1935), syllabus.[9]

The Department made a particularly relevant application of the rule in *Youngblood* v. *State of New Mexico* (on rehearing), 46 L.D. 109 (1917). There the State had filed a school land indemnity selection for land on August 5, 1914. Youngblood alleged that he made a settlement on the land on February 6, 1916, and on February 12, 1916, he filed a homestead application. Thereafter when it was discovered that a portion of the land assigned as base had already been used in another selection, the Commissioner of the General Land Office (now Bureau of Land Management) cancelled the selection in part. The State then filed an application to amend in order to cure the defect.

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[9] Accord: *Hodges* v. *Colcord,* 193 U.S. 192 (1904); *McMichael* v. *Murphy,* 197 U.S. 304 (1905); *Joyce A. Cabot et al.,* 63 I.D. 122 (1956); *R. B. Whitaker et al.,* 63 I.D. 124 (1956).

The Department rejected Youngblood's homestead application and on rehearing stated:

> "In the former Departmental decsion it was held that inasmuch as the selection was intact and *prima facie* valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights by filing the same. Furthermore, it was held that his alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.
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> "The decision complained of is in harmony with the recent Departmental decision of March 17, 1917, in the case of *California and Oregon Land Company* v. *Hulen and Hunnicutt* (46 L.D., 55), wherein it was held:
>
> > 'Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of local land office.' "

While the cited decisions do not involve the segregative effect of an application or entry improperly allowed because the funds applied for were unavailable, the rule is equally pertinent in that situation. In *Keating et al.* v. *Doll*, 48 L.D. 199 (1921), the Department held that a homestead entry allowed while the land was still withdrawn as part of a national forest segregated the land and required the rejection of applications filed later although the application for entry was prematurely filed prior to the date set for opening the land to entry and was otherwise defective.

These decisions made it abundantly clear that the lands covered by the State selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid.

As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands were available.

The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department's salutary policy of giving all applicants an equal chance to acquire public land.

Accordingly, the land office, as required by the pertinent regulation, *supra,* properly rejected the notices of settlement or occupancy.

With the claims of the individual applicants removed from the appeal, we may now consider the status of the State's selection.

As we have seen, the Director relied upon the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. *Atherton Sinclair Burlingham et al.,* 71 I.D. 126, 128, 129 (1964); *Hunt* v. *State of Utah,* 59 I.D. 44 (1945). While this principle is sound and controlling in most similar situations, it is necessary to examine both the reasons underlying it and Departmental practice to determine whether it requires the rejection of the State's selection here.

There are, it appears, two fundamental objections to allowing applications to be filed for lands before they are open to disposition. One is administrative. As the De-

partment said in refusing to hold in suspense an oil and gas application for lands then unavailable for leasing:

> "* * * the rule is founded upon sound administrative practice. It prevents the public land records from being burdened with thousands of applications on which there is no possibility that action can be taken in the foreseeable future. If one person can maintain an application for land not available for leasing several or a hundred can. [Footnote omitted.]
>
> In view of the hundreds of thousands of acres of public land which are not available for leasing for one reason or another, it is plain that the problem of administering premature offers would be considerable. * * *" *J. G. Hatheway et al.*, 68 I.D. 48, 52 (1961).

The second reason is equitable—that is, it avoids giving an applicant a preference right to which he has no right and assures to all the public equality of opportunity to file.

As the Department held in a case involving the rejection of an oil and gas lease offer for lands which the records showed to be in an existing lease which had in fact terminated and the land then had been leased again and the second lease terminated, all without notation:

> "* * * [T]he overriding objective of the rule has been to assure to all the public equality of opportunity to file. This has been stated on many occasions. *Germania Iron Co.* v. *James*, 89 Fed. 811 (8th Cir. 1898), appeal dismissed, 195 U.S. 638; *George B. Friden*, A-26402 (October 8, 1952); *B. E. Van Arsdale*, 62 I.D. 475 (1955); *E. A. Vaughey, supra; M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956).
>
> "This being the primary objective of the notation rule, to notify the public so that all will have an equal opportunity to file for land, it would be manifestly unfair to say that although there was an outstanding

> entry of record in the tract book of an oil and gas lease (Evanston 09156 (b)) covering the lands in secs. 2 and 11, no notation of termination of the lease was necessary to open the land to filing because, entirely outside the record, another lease (Wyoming 0257) had been issued and terminated following the termination of the first lease. This would give an unfair advantage to those who by chance knew of the issuance of the second lease. Those who relied on the tract book would have no notice of the second lease but would await the notation of termination of Evanston 09156(b) in the tract book before filing for the land. It would be no answer to say that others could have ascertained the issuance of Wyoming 0257 by checking the serial register and plats. The fact is that the Department has said that the tract book is the record which will be determinative of whether land is open for filing, and there is no reason why the public should have to resort to other records." *Max L. Krueger, Vaughan B. Connelly,* 65 I.D. 185, 191 (1958).

In an earlier case in which the Department considered the effect of State exchange applications filed for lands still in a temporary withdrawal, the State, while admitting that the selections were invalid and properly subject to rejection, asked that the selections be allowed to remain of record and that action be suspended until the withdrawal was revoked. In refusing to do so the Department held:

> "The obvious purpose in asking for the suspension of these selections is to place the State in a situation where it will have a preferred right to exchanges over others under the provisions of section 8 of the Taylor Grazing Act, the assumption being made that, upon revocation of the withdrawal that now constitutes the bar to the selections, the rights of the State would attach *eo instanti* and shut out all subsequent appli-

cants for the same land which might lawfully be filed under the same section of the act. In other words, these invalid selections would operate as segregation of the land applied for from other appropriation attempted when the land became subject to such filing. To so hold would be in direct conflict with the ruling in *Hendricks* v. *Damon* (44 L.D. 205), which has been cited and applied in cases without number in the administration of the public land law. There is nothing in section 8 of the Taylor Grazing Act which accords preference to the States in exchanges made thereunder, and no circumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to exchanges. Action suspending these selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal of July 9, 1934, is tantamount to provisions in the order of restoration that exchanges under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. The applications here involved are void and do not become validated by the removal of the withdrawal." *State of Arizona*, A-18816, etc. (October 16, 1935).[10]

The question then is whether the considerations underlying the general rule are pertinent here and, if they are not, whether *cessante ratione legis, cessat et ipsa lex,* a different result should follow.

Examining the problem first again in its administrative aspect to ascertain whether the State's method imposes an undue burden on the land office, we note that the State is the only applicant whom the land office permits to file "prematurely." There is, thus, no likelihood that hun-

[10] Accord: *Hunt* v. *State of Utah, supra,* 46-47.

dreds of other applicants will clutter the records with their filings.

Considering next the equitable aspects, we observe immediately that the State has a preference right to all land restored from withdrawal, granted to it by section 6(g) of the act of July 7, 1958, *supra*. Therefore, the fact that the State did get an opportunity to file on the restored land before anyone else is not inequitable or unfair or contrary to the statutory scheme. It merely advanced a bit the time in which the State could make its statutory preference known. Since the State has a statutory preference right, it is not inequitable to give it a chance to take advantage of it.

The force of the other argument—equality of opportunity to all to file—is dissipated by the same reasoning. If the statute intends that there be no equality of filing, then no individual is harmed if the State is allowed to file somewhat sooner than that general practice permits.

Therefore we conclude that in the circumstances there are no reasons of policy which require that the Department reject the State selection.

Furthermore, as we noted earlier, the State amended its application four times, twice within the preference right period and twice thereafter and all before publication and before Kalerak or any of the other appellants sought to establish any rights to the lands in their applications or settlements.

In such circumstances is the Department bound to insist on a new filing to replace the original premature one or can it accept the amendments as a demonstration of the State's interest in its selection and relieve it of the necessity filing anew? We believe that it can.

In *Hunt* v. *State of Utah, supra,* the Department in a somewhat similar situation adopted a solution relieving the

State from the necessity of strict compliance with the regular procedure. After holding that the State gained no priority by a premature filing of an application to select certain land, it having no preference right to the land sought, even after restoration of the land, the Department gave effect to the State's selection thus:

> "It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the original application should be regarded as having effect only as of the time of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application." (59 I.D. at 47.)

In other words, although the State's original and only application should have gained it nothing, the Department allowed it to be treated as though it had been filed as of the day the Commissioner purported to reinstate it.

So here the filing of an amendment to an application, in the absence of any reason not to so consider it, can be deemed the refiling of the original selection and the State's rights can be determined as though the original selection had been filed then. Since the first two amendments came within the preference period, the State, then, has exercised its preference right and has established its claim to the selected lands.

In another case where a railroad had filed an indemnity selection list for lands held by the Department not to be open to such filing, but which were thereafter made available for selection by statute, the Department held that in the absence of intervening rights the original selection list could be treated as valid from the date the Commissioner of the General Land Office instructed the local officers to allow the selection, if otherwise proper, and to require the

railroad to submit supplemental lists of tracts which were free from other claims and those to which adverse claims were asserted, despite the fact that a homestead application was filed by another before the railroad filed its supplemental lists. In affirming the validity of the railroad's selection the Department said:

> "The selection, in so far as the tracts free from adverse claim were concerned, was, in fact, treated, and properly so, in the nature of a new selection, effective and pending from and after the date of receipt of the Commissioner's letter by the local officers, but not prior thereto.
>
> It devolved upon the Department, as hereinbefore stated, to dispose of said lists under the law then in force and the action taken by the Commissioner was to relieve from suspension the railway selection. The land at the date the Commissioner took that action, being subject to appropriation by the railway company and the railway company having at all times prior thereto manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original selection could have been and was allowed as to the tracts free from adverse claim, as above stated, irrespective of the supplemental lists. The supplemental lists were in nowise a prerequisite of the taking of appropriate action on the original selection under the act of March 3, 1911, *supra*.
>
> It is, therefore, held that movant, not being a party in interest at the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers, will not be heard to question the Department's authority to relieve from suspension the pending railway selection, the disposition of which appears regular and in accord-

ance with the law." *Trott* v. *Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Again we see that the Department need not insist upon a mere formality when there are no adverse rights to be considered. Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.

Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as though the State had refiled its original application at the time of the amendments.[11]

There remains Kalerak's contention that the State has alienated or bargained away its authority to make selections in violation of the prohibition in 6(g) of the Statehood Act, *supra*. There is no evidence to support this charge. The mere fact that the State is making a selection for land that the city desires does not mean that the State has sold or otherwise disposed of its authority to make this selection or any other.

In his supplemental pleadings on appeal Kalerak has raised several new issues. First, in rebuttal to an asser-

---

[11] It is also interesting to note that the practice of allowing a State to file premature applications so long as it did not prejudice any applicant filing on the day the lands became available is not of recent origin. For a time State selections filed prior to the filing of a township plat of survey were recognized as being filed on the proper date and in turn after all those present at the land office at the time of opening on the proper date. *State of California* v. *Koontz et al.*, 32 L.D. 648 (1904); 33 L.D. 643 (1905).

The Department soon formalized its practice by a regulation limiting the State to a period of three days prior to the regular opening day in which to submit premature selections. Regulations paragraph 12, June 23, 1910, 39 L.D. 39, 41 (1910). This provision was later omitted from the regulation, 43 CFR, 1938 ed., 270.12.

tion of the State, he denies that the lands sought by Kalerak and others are necessary to protect the watershed. This issue is irrelevant, for the validity of the State's selection does not depend on the purpose for which it is made. The statute requires no particular purpose to justify a selection and none is required by the Department. The State's motivations are its own concern.

Next Kalerak urges that the United States District Court for the District of Alaska has already decided the case in *Taylor et al.* v. *Greater Anchorage Area Borough et al.*, No. A-91-65 Civ., October 15, 1965. This was an action by several homestead settlers or entrymen to enjoin the Borough from restricting the plaintiffs from full enjoyment of their rights under the homestead laws, or, specifically, from preventing the plaintiffs from access to or erecting structures on their homesteads. The Court issued a preliminary injunction effective only against the Borough which it said would "remain in effect until the Department of Interior has determined the dispute now appealed to it by the State of Alaska in the Kalerak case."

The Court emphasized that the injunction would not apply to either the State or Alfred P. Steger, described in the complaint as "Chief Records and Public Service, Anchorage District and Land Office, Bureau of Land Management."

While the Court did say that it found the State's original selection was "invalid against the rights of any others lawfully claiming rights under or against rights to said Federal Land," it also recognized that the issue was before the Secretary on appeal and that it would reexamine the matter when the Department had rendered its decision. In other words, it was not attempting to supersede the Secretary's duty to dispose of the appeal or to substitute its judgment for his. The Secretary remains free to examine the issues and to decide the case in accordance with his understanding of the law.

Finally, Kalerak has requested that an oral argument be held primarily to present his position that the lands in his entry are not needed to protect the watershed with which the City of Anchorage is so concerned. As we have seen, the controlling issues in the case are legal, not factual, and the issue of whether all or any of the selected lands are part of the watershed is not really material to their resolution. The issues have been extensively briefed and oral argument would add little, if anything, to the written discussions. Therefore Kalerak's request for oral argument is denied.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, is reversed and the decisions of the land office refusing to record the several notices of occupancy or settlement are affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

Decision

Andrew Kalerak, Jr.	Homestead Location Notice
State of Alaska	State Selection Application

Land Office Decision Reversed
Selection Application Rejected in Part

Andrew Kalerak, Jr., has appealed from a letter-decision of the Anchorage District and Land Office, dated June 9, 1965, notifying him that his Notice of Location of Settlement or Occupancy Claim in Alaska, Anchorage 062515, for a homestead entry, could not be accepted for recordation. The stated reason for this determination was that the land involved is included in a valid selection, Anchorage 058566, made by the State of Alaska pursuant to section 6(b) of the Act of July 7, 1958 (72 Stat. 339-343), and is therefore segregated from all applications and appropriations under the public land laws, including the mining laws.

The appellant contends, among other things, that the selection application, Anchorage 058566, filed by the State of Alaska on January 8, 1963, is not valid because the subject land, along with other land selected by the State, was withdrawn by Public Land Order 576, but that his homestead claim is valid as the land was not reserved when he filed his notice of location [on May 27, 1965]. The appellant indicates that he will continue to work and spend time and money on his claim until the matter is settled, and requests that his claim be placed on the "public land record map books", until the issue is resolved. (The appellant states in his notice of location that he occupied the subject land on May 26, 1965, by staking the corners, marking the boundaries, and placing concrete blocks on the land for the

start of a foundation, presumably for a dwelling). The appellant has also resubmitted the required $10 recording fee, which had been returned to him by the land office.

The appellant's contention that the selection application filed by the State of Alaska is not valid, has merit.

The Act of July 7, 1958, *supra,* grants to the State of Alaska the right to select, within 25 years from January 3, 1959, not to exceed 102,550,000 acres *from the public lands of the United States which are vacant, unappropriated and unreserved at the time of their selection.* (Emphasis supplied).

It cannot be said that the subject land was vacant, unappropriated and unreserved, at the time the State of Alaska filed its selection application on January 8, 1963. The record shows that the land in question was included in some 17,800 acres of lands which were withdrawn by paragraph 4 of Public Land Order 576 of March 29, 1949, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved under the jurisdiction of the Secretary of the Interior for the protection of the water supply of the City of Anchorage. The lands were so withdrawn at the time it filed its selection application in the land office on January 8, 1963, and even though the State requested in its selection application with regard to the 17,800 acres, that paragraph 4 of Public Land Order 576 be revoked in order that the State's preference right of selection be included in the revocation order simultaneously with the filing of the selection application, these lands were not subject such application. The Department has consistently held that an application filed for land while the land is withdrawn is invalid. The fact that the land was later restored from the withdrawal does not validate the application. *Charles W. Trounson,* 60 I.D. 182 (1948). See also *John Rovetto,* A-2752 (December 9, 1957); *Robert L. Miller,* 68 I.D. 81 (1961). While the cases cited involve applications filed by private individuals under vari-

ous land laws, the same principle applies to selection applications filed by the State of Alaska.

In view of the foregoing, the selection application, Anchorage 058566, must be and is hereby rejected insofar as it includes the lands described in paragraph 4 of Public Land Order 576.[1]

The lands described in paragraph 4 of Public Land Order 576 were restored by Public Land Order 3022 of April 8, 1963. There is no provision in this order making the restoration retroactive to the filing of the selection application by the State of Alaska on January 8, 1963. The order provided that until 10:00 AM, July 8, 1963, the State of Alaska had a preference right to select the lands under the provisions of the Act of July 28, 1956 (48 U.S.C., 46-3b), and section 6(b) of the Act of July 7, 1958, *supra*. The State of Alaska did not file a new application, or amend its original application to select the lands after they had been restored, either during the preference right period provided by the restoration order, or subsequent to that time. The lands in question, therefore, became available and subject to other applications and settlement under the public land laws, including the mining and mineral leasing laws as of 10:00 AM, July 8, 1963.

It can only be concluded then that the land embraced in the homestead claim of the appellant, Andrew Kalerak, Jr., was in fact open to settlement or occupancy as a homestead entry as claimed in his notice of location filed in the land office on May 27, 1965. Therefore, the appellant's notice of location is proper for acceptance and recordation as of the date of its filing in the land office.

---

[1] The Director of the Bureau of Land Management has the authority at any time to take up and dispose of any matter pending in a land office or to review any decision of a subordinate officer with or without an appeal. *State of Utah*, 71 I.D. 392 (1964).

Accordingly, the decision appealed from is reversed insofar as it refused to accept the notice of location for recordation.

When this decision becomes final, the homestead case of Andrew Kalerak, Jr., will be remanded to the Manager, Anchorage District and Land Office for proper recordation on the records of the land office, and for any other action as is necessary in the circumstances. This decision does not prejudice the right of the State of Alaska to file a new selection application for the lands restored by Public Land Order 3022 of April 8, 1963, which will be considered on its merits.

The State of Alaska is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. No filing fee is required. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by submitting positive and substantial evidence wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served by the State of Alaska is:

Mr. Andrew Kalerak, Jr.
2910 Eureka Drive
Spenard, Alaska

JAMES F. DOYLE
Chief, Office of Appeals and Hearings

APPENDIX E

Statute, Regulations and Public Land Orders Involved

Alaska Statehood Act (Publ. Law 85-508, July 7, 1958), 72 Stat. 339-352 (48 U.S.C., Ch. 2), provides in pertinent part:

Sec. 6(a). For the purpose of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, . . . other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas.

Sec. 6(b). The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection.

Sec. 6(g). Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. * * * The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during

which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation.

The Interior Department regulations provide in pertinent part:

43 C.F.R. § 1821.6-6 (formerly 43 C.F.R., § 104.13). Entry improperly allowed not to be amended.

Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections, or locations, amendments will not be allowed, because such claims, being invalid, should be canceled, and upon cancellation thereof a new entry, selection, or location may be allowed as though the former had never been made.

43 C.F.R. § 222.9-3 (formerly 43 C.F.R. 76.7-76.10):

* * *

(c) *Applications for selection.* (1) Applications for selection of lands under the act will be made by the proper selecting agent of the State and will be filed, in duplicate, in the land office of the district in which such selected lands are situated. No special form is required but it must be typewritten and must contain the following information:

(i) A reference to the act of July 28, 1956 (70 Stat. 709), as supplemented.

(ii) A certificate by the selecting agent showing:

(*a*) That the selection is made under and pursuant to the laws of the State.

(*b*) The acreage selected and the cumulative acreage of all prior selection lists pending and finally approved for clear-listing or patenting.

(c) His official title and his authority to make the selection on behalf of the State.

(*d*) That no portion of the selected land is occupied for any purpose by the United States and that to the best of his knowledge and belief the land is unoccupied, unimproved, and unappropriated by any person claiming the land other than the applicant, and that at the date of the application no part of the land claimed or occupied under the mining laws.

(*e*) That the selected land does not extend more than 160 rods along the shore of any navigable water or that such restriction has been waived or should be waived. (§ 2024.2 of this chapter.)

(*f*) All the facts relative to medicinal or hot springs or other waters upon the selected lands.

(iii) If the selected lands are surveyed, the legal description of the lands in acordance with official plats of survey.

(iv) If the selected lands are unsurveyed and are described by approved protraction diagrams of the rectangular system of surveys, such description is required.

(v) If the selected lands are unsurveyed and are not described by approved protraction diagrams, a description of the lands and a map or maps, in duplicate, sufficient to permit ready identification of the location, boundaries, and area of the lands.

(2) Selections must be accompanied by a filing fee of $10 for each 5,760 acres or fraction thereof in the selection which fee is not returnable.

---

43 C.F.R. § 2222.9-4 (formerly 43 C.F.R. § 76.11-16). Grant for general purposes.

(a) *Statutory authority.* (1) The act of July 7, 1958 (72 Stat. 339-343), referred to in paragraph (a) to (d) of this section as "the act," grants to the State of Alaska the

right to select, within 25 years from January 3, 1959, not to exceed 102,550,000 acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of selection. The act of September 14, 1960 (74 Stat. 1024), defines vacant unappropriated, unreserved public lands in Alaska to include the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The act further provides that no selection shall be made in the area north and west of the line described in section 10 thereof (72 Stat. 345) without the approval of the President or his designated representative.

(b)(2) Under the act, the State may select any vacant, unappropriated, and unreserved public lands in Alaska, whether or not they are surveyed and whether or not they contain mineral deposits.

(b)(3) Patents will be issued for all selections approved under the act by the authorized officer of the Bureau of Land Management but such patents will not issue unless or until the exterior boundaries of the selected area are officially surveyed.

(c) *Applications for selection.* (1) Applications for selection under the act must conform with the requirements of § 2222.9-3(c) (1) and (2), and with the following modifications of:

(i) Section 2222.9-3(c)(1)(i) is modified to require a reference to the act of July 7, 1958 (72 Stat. 709).

(ii) Section 2222.9-3(c)(1)(i) is modified to require a statement that the selection, together with other selections under the act pending or approved, does not exceed 102,550,000 acres (400,000 acres where one of the grants for community purposes is involved).

(2) All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses

of the lands involved. A tract will not be considered compact if it excludes other public lands available for selection within its exterior boundary. Each tract selected shall contain at least 5,760 acres unless isolated from other tracts open to selection.

(3) If the selected lands are in the area north and west of the line described in section 10 of the act, all selection[s] made or confirmed by the act must be accompanied by a statement of the President or his designated representative showing that he approves the selection.

(4) Lands selected must be described as provided by § 2222.9-3(c).

(5) Section 2222.9-3(c)(1)(ii), and paragraph (a)(1) of this section do not apply to the extent that an application embraces a reserved or retained interest.

---

43 C.F.R. § 2222.9-5. All grants.

(a) *State preference right of selection; waivers.* (1) The acts of July 28, 1956 (see § 2222.9-3(a)), and July 7, 1958 (see paragraph (a) of this section), provide that upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, except as against prior existing valid rights, equitable claims subject to allowance and confirmation and other preferred rights of application conferred by law.

(2) Where the proper selecting agent of the State files in writing in the appropriate land office a waiver of the preference provisions of paragraph (a) of this section in connection with the proposed revocation of an order of withdrawal, the order affecting such revocation will not provide for such preference.

(b) *Segregative effect of applications.* Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 2222.9-3(c)(1) (iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

(c) *Publications and protests.* (1) The State will be required to publish once a week for five consecutive weeks in accordance with 1824.4 of this chapter, at its own expense, in a designated newspaper, and in a designated form, a notice allowing all persons claiming the land adversely to file in the appropriate office their objections to the issuance of patent or certification for lands selected under the regulations of this part. A protestant must serve on the State a copy of the objections and furnish evidence of service to the appropriate land office.

(2) The State must file a statement of the publisher, accompanied by a copy of the notice published, showing that publication has been had for the required time.

Public Land Order 576, 14 F.R. 1614 provides in pertinent part as follows:

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943 and section 4 of the act of May 24, 1928, 45 Stat. 729 (49 U.S.C., 214), it is ordered as follows:

• • • • •

Subject to valid existing rights and withdrawals, the public lands within the following-described areas are hereby withdrawn from all forms of appropriation under the

public-land laws, including the mining and mineral-leasing laws, and reserved as follows:

* * * * *

(4) [describes certain lands including those involved herein.]

Public Land Order 3022, 28 F.R. 3661, provides in pertinent part as follows:

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is hereby ordered as follows:

1. Public Land Order No. 576 of March 29, 1949, so far as it withdrew in paragraph numbered four thereof, an area of approximately 17,800 acres in Tps. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, for the protection of the water Supply of the city of Anchorage, is hereby revoked.

* * * *

3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. Part 76.

* * * *

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. . . .

APPENDIX F

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LANDS
344 Sixth Avenue
Anchorage, Alaska

January 7, 1963

[Filed Anchorage Land Office January 8, 1963]

Bureau of Land Management
Anchorage Land Office
Sixth and Cordova
Anchorage, Alaska

Ref: S-1209
(City of Anchorage Watershed)

Gentlemen:

Under the provisions of the Act of July 7, 1958, Section 6 (b) and pursuant to Chapter 169, SLA 1959 application is hereby made for the land described on the attached sheet. (See Exhibit A.)

In support of the application, the applicant hereby certifies that:

This selection is being made under and pursuant to the laws of the State of Alaska, specifically, under the authority of Article II, Section 5 (12), Chapter 169, SLA 1959.

The area described contains approximately 26,800.00 acres. The cumulative acreage of all prior selection lists pending and finally approved for clear-listing or patenting totals 11,919,929.99 acres, and does not exceed the 102,550,000 acres allowed by law.

No portion of the selected land is occupied for any purpose by the U. S., and to the best of my knowledge and belief, the land is unoccupied, unimproved, and unappro-

priated by any person claiming the land other than the applicant.

The land applied for does extend for more than 160 rods along the shore of any navigable water, and it is requested that this restriction be waived.

There are no known medicinal, hot springs or other waters known to the applicant on the selected lands.

Sincerely yours,

/s/ Roscoe E. Bell
Roscoe E. Bell, Director

EXHIBIT A

Page 1 S.-1209
Anch. 058566

6.1 General Grant Selection (Act of July 7, 1958)
Section 6(b)

State of Alaska
Division of Lands
344 Sixth Avenue
Anchorage, Alaska

(City of Anchorage Watershed)

* * * * *

[describes certain lands herein including the lands involved.]

Approx. Total 17,800 acres

The above lands withdrawn by Paragraph 4, PLO - 576

[Pp. 2-3 of Ex. A are omitted. They deal with lands not withdrawn by PLO 576 and not involved herein.]

APPENDIX G

Laws Granting Preference to States or Individuals To Enter Public Lands

U.S. Code Provision	Beneficiary and Purpose	Length of Preference
43 U.S.C. § 852	To states for deficiencies in scheduled land selections	6 months
43 U.S.C. § 863	To states with respect to certain lands surveyed at the state's request	60 days
43 U.S.C. § 282	To World War II and Korean War veterans*	90 days
43 U.S.C. § 298	Qualified private individuals for stock-raising homestead entries	90 days
43 U.S.C. § 315(m)	Owners, homesteaders, lessees and other lawful occupants of contiguous lands for grazing	To be determined by the Secretary of the Interior
43 U.S.C. § 326	Qualified individuals for desert lands	90 days

* Expired September 27, 1959. Similar preferences had been granted to veterans of prior wars. See 43 U.S.C. § 271.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 896

ANDREW J. KALERAK, JR., ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, AND THE STATE OF ALASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 396 F.2d 746 (Pet. App. A, 1a-6a).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1968, and a timely petition for rehearing was denied on September 23, 1968. By order of Mr.

Justice Douglas, the time for petitioning for a writ of certiorari was extended until January 3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' applications for various tracts of land on the ground that the tracts were included in valid and effective selections of public land previously made by the State of Alaska pursuant to the Statehood Act.

STATEMENT

Petitioners are private individuals who made separate applications for homestead and trade and manufacturing sites in Alaska. The Secretary of the Interior ruled that these applications were invalid because the land in question had already been selected by the State of Alaska as part of the public land it was authorized to select under the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. pp. 9025-9031. The court below unanimously sustained this determination.

Under Section 6(b) of the Statehood Act, Congress authorized Alaska to select approximately one hundred and three million acres of public lands "which are vacant, unappropriated, and unreserved at the time of their selection". The new State was given a period of not less than ninety days following revocation of any order withdrawing lands within which it was to have a "~~perferred~~ preferred right of selection" (Sec-

tion 6(g)). By order of the Interior Department in 1949, the lands which are involved in this suit had been generally withdrawn from appropriation. In 1962, the City of Anchorage, concerned about the continuation of its water supply, requested that the Bureau of Land Management of the Interior Department withdraw these lands for watershed purposes. Since the city was not a proper applicant for withdrawal, the Bureau suggested that the State of Alaska file a blanket selection of these lands, with assurances that the selected lands would be classified as watershed, and the Bureau would then seek cancellation of the 1949 withdrawal order insofar as it related to these lands. Accordingly, in January 1963, the State of Alaska filed its application (A-058566) for selection, pursuant to Section 6(b) of the Statehood Act, 72 Stat. 339, 340, 48 U.S.C. pp. 9026.

In April 1963, by Public Land Order 3022, 28 Fed. Reg. 3661, the Secretary of the Interior revoked the withdrawal of the land and released it for appropriation. In accordance with Section 6(g) of the Statehood Act, the order provided that Alaska be given a 90-day exclusive preference period (until July 8, 1963) to claim the land. During the 90-day period, Alaska did not file a new claim but it filed two amendments to the original application, specifically referring to it, to include additional lands (to which petitioners make no claim). Two further amendments were filed, in similar form, and pursuant to a decision of the Bureau of Land Management a notice describing *all* lands selected by Alaska was published in an Anchorage newspaper for five consecutive weeks in late 1964.

Between May 27, 1965, and June 17, 1965, some

two years after Alaska had filed its selection and amendments, petitioners filed homestead or trade site claims to some of the land embraced in the State's original application. On these facts, the Secretary of the Interior rejected petitioners' applications, holding that Alaska's application—the first application on record, even if defective—segregated the land from any further appropriation. In any event, the Secretary concluded, Alaska's selection was valid and effective because it could, without offending administrative policy or sound equity, be deemed as refiled within the exclusive preference period when the State submitted amendments expressly referring to the original selection. Although the district court viewed the original selection, filed while the lands were still in withdrawal, as void, the court of appeals upheld the Secretary's determination (Pet. App. A, 4a):

> Alaska's four amendments of its original application for selection, made after the withdrawal of the lands had been revoked, amounted to a reapplication for selection of the lands described in the original application, the result being that plaintiffs' claims, subsequently tendered for filing, were properly rejected.

The court reasoned (*ibid*):

> While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original applica-

tion (referring thereto by number), rather than by new applications, (2) the amendments referred to "additional open lands," indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application.[1]

---

[1] We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of of [sic] lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

ARGUMENT

No consideration warranting the exercise of this Court's discretionary jurisdiction is present. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court. And it is of narrow significance because it turns on the peculiar factual context of this case, unlikely to recur.

The Secretary reasonably concluded that the amendments made by Alaska during its preference period

had the effect of a reaffirmation and refiling of the original selection. The selection and amendments were of record in the tract books, and the land described in the original application and amendments was included in the notice published in accordance with Interior regulations (43 C.F.R. 2222.9-5(c)). Not until long after Alaska had unambiguously asserted its claim to these lands did petitioners seek to establish any interest in them. The Secretary of the Interior thus properly determined that, with the filing of the amendments, the land in controversy was validly selected (Pet. App. C, 37a):

> Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.
>
> Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as though the State had refiled its original application at the time of the amendments. [Footnote omitted.]

Petitioners can point to no equitable circumstances of sufficient weight to defeat the preference given to Alaska by Congress and implemented by the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

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No. 896

Supreme Court of the United States

OCTOBER TERM, 1968

ANDREW J. KALERAK, JR., *et al, Petitioners,*

vs.

WALTER J. HICKEL, Secretary of the Interior and

STATE OF ALASKA, *Respondents.*

MEMORANDUM OF RESPONDENT, STATE OF ALASKA, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM OF RESPONDENT, STATE OF ALASKA, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals is reported at 396 F.2d 746 (Pet. App. A, 1a-6a).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1968, and a timely petition for rehearing was denied on September 23, 1968. By order of Mr. Justice Douglas, the time for petitioning for a writ of certiorari was extended until January 3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Alaska Statehood Act of July 7, 1959 (72 Stat. 339) permitted the State of Alaska to select a quantity of Federal lands within the State to become State lands.

On January 8, 1963, the State of Alaska filed a formal selection application, A-058566, for 26,880 acres of land as part of its allotment under the Statehood Act (R. 179). The lands involved were deemed necessary as a future water source for the Greater Anchorage area. At the time of this application the lands were in part subject to paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, withdrawing them from all forms of appropriation for the protection of the water supply of the City of Anchorage (R. 178). The State's selection was posted in the appropriate land and status records (R. 179).

On April 8, 1963, the Department of the Interior issued Public Land Order 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of Public Land Order 576, *supra*. On the same day, April 8, 1963, the State filed an amendment to its application adding certain acreage to it. Three subsequent amendments were filed on May 24, 1964, and March 17, 1964.

On October 8, 1964, the Land Office at Anchorage issued a decision stating that the selected lands were then segregated from all appropriations under the Public Lands Laws and directing the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks (R. 181). This publication was accomplished within the time allowed (R. 181).

More than two years after the State's application, on May 27, 1965, Andrew Kalerak, Jr., filed a Notice of Location of Settlement of Occupancy Claim in Alaska, Anchorage 058566 (R. 181). The Land Office refused to accept the notice for recordation on the grounds it was in conflict with the State's selection.

Subsequent claims of the other petitioners were rejected on the same grounds.

Kalerak appealed to the Office of Appeals and Hearings where the decision of the Anchorage Land Office was reversed (R. 29).

The State of Alaska appealed to the Secretary of the Interior and the claims of the other petitioners were consolidated at that point (R. 177).

The Secretary of the Interior decided that the lands covered by the State selection were not open to the initiation of claims by settlement or location and that all attempts by petitioners to do so were invalid in light of the long-standing principle of segregation (R. 18).

Second, the Secretary decided that sound administrative and equitable considerations in view of the Interior Department's internal management and the broad Congressional policy implemented by the 90 day preference right provision of the Alaska Statehood Act (72 Stat. 339) led to the conclusion that Alaska's application, although premature, should be accepted (R. 25).

The United States District Court at Anchorage, after dutifully finding that the Secretary's decision was arbitrary, capricious, in excess of statutory right and without observance of procedure required by law, etc., reversed. Further appeal followed.

The Court of Appeals for the Ninth Circuit, recognizing the critical importance to the State of Alaska of protecting the future water supply of the State's

most populous area, reversed the lower Court and affirmed the decision of the Secretary of the Interior.[1]

The sole controversy arising from the entire official transaction in this case is whether or not the petitioners, by reliance on an alleged procedural defect, which could in no way act to their prejudice, can frustrate the basic purpose of transferring the public trusteeship of this vital mountainous watershed area from one sovereign to another so as to assure its conservation and freedom from contamination.

ARGUMENT
THE DECISION OF THE SECRETARY OF INTERIOR WAS IN ALL RESPECTS REASONABLE, LEGAL AND IN ACCORDANCE WITH POLICY ADOPTED BY THIS COURT

In *Lassen v. Arizona ex rel. Arizona Highway Department,* 385 U.S. 458, 17 L.Ed.2d 515 (1967), this Court had occasion to construe a Congressional land grant to the State of Arizona for the benefit of certain institutions in that State. The act involved express limitations upon the manner of disposition of those lands. Those limitations, however, in light of the purposes of the Act and the abuses which the restrictions were intended to prevent, were found to have no reasonable application to the land transfer intended in that case. This Court, recognizing that to require Arizona to follow precisely the procedures of the Act would be to sanction an empty formality, concluded that it was consonant with the Act's essential purpose

[1] The Court of Appeals found it unnecessary to rule on the Secretary's alternative ruling which recognized that Alaska's original application, even if defective, accomplished a segregation of the lands in question which prevented petitioners from acquiring rights therein while the segregation remained in effect.

to exclude the transfer there in issue from the restrictions imposed by Congress.

In the case now before the Court it is undisputed that Alaska filed an application in proper form for the watershed lands.[2] A fraction of the watershed acreage, those parcels claimed by petitioners, were not eliminated from withdrawn status until twelve weeks later when P.L.O. 576, insofar as it affected the lands involved in this litigation, was revoked. P.L.O. 3022, 28 F.R. 3661. The new public land order set out the three month preference right in favor of the State of Alaska as was required by the Alaska Statehood Act (72 Stat. 339). During these three months, a period in which all other potential applicants were absolutely barred from selecting these lands, Alaska twice amended its application to include additional lands. These amendments expressly referred on their face to the original application by precise Bureau of Land Management number, Anchorage 058566, and thereby incorporated the original application by express reference.[3]

Reduced to its lowest denomination, the contention of petitioners is that failure on the part of Alaska to retype its original letter of application and refile same[4] with the amendments during the ninety (90) day preference right period must defeat the attempt to transfer this critical watershed area from one sovereign to another, via a procedure suggested and accepted by the Bureau of Land Management, in

---

[2] The application is a simple typed letter describing the lands requested.
[3] Each amendment was accomplished by simple typed letter. See Appendix "A."
[4] It appears that filing of a carbon copy or photo copy of the original application during the preference right period would have equally satisfied the alleged technical defect.

favor of petitioner's applications which were initiated more than two years later.

For reasons shown below, the watershed transfer here involved in no way contravenes the reasons for the rules by which petitioners seek to defeat it or admits of the abuses which those rules were intended to prevent. To require adherence to those rules, if in fact they were violated, would in the facts of this case saction an empty formality in a manner rejected by *Lassen v. Arizona, supra.*

THE LIMITATIONS UPON PREMATURE FILING HAVE NO RATIONAL APPLICATIONS TO ALASKA'S WATERSHED SELECTION

The primary and compelling reason for the restriction on premature filing is to assure all members of the public an equal opportunity to file on public lands as they become available (R. 189). That is, it would be inequitable to give effect to a premature application because this would be equivalent to granting a preference right to the early applicant. The inequity ordinarily involved in allowing an applicant to file for land while it is still withdrawn is illustrated in *State v. Arizona,* A-18816 (October 16, 1935).[5]

A second objection to premature filing is the potential administrative burden which could result. If premature filings on withdrawn land generally were permitted the public land records could become burdened with thousands of applications, possibly for the same or overlapping parcels, which the Land Office would have to clear. See *J. G. Hathaway, et al,* 68 I.D. 48, 52 (1961) (R. 189).

---

[5]See page 15, Decision of the Secretary of the Interior below, R. 191.

These reasons for generally applying the rule against premature filing are compelling. The question is whether the reasons for the general rule exists in this case. Where, as here, the reasons have no rational application to the facts, application of the rule is meaningless.

Since the State of Alaska was the only applicant allowed to file "prematurely" under the procedure suggested by the Bureau of Land Management for transfer of the watershed no undue administrative burden could have been imposed on the land office. As the decision of the Secretary of the Interior below points out there was no possibility that hundreds of other applicants would clutter the record with their premature filings. Petitioner's suggestion that Alaska alone would "clutter the records" of the land office with premature filings is pure fantasy unsupported by any fact obtaining either before or after the transfer herein in question and contrary to all experience under the Alaska Statehood Act.

More significant is whether the premature application of Alaska was inequitable. Any possibility of inequity is removed by the following fact: The State of Alaska had a statutory preference right to all lands restored from withdrawal, granted to it by Section 6(g) of the Alaska Statehood Act (72 Stat. 339). Thus, the fact that Alaska filed on land before it was restored was in no way inequitable as to the rights of petitioners or any other potential applicant.

Clearly, the reasons underlying the general rule on premature filings did not apply in this case and the decisions below have been correct in not applying that

rule.[6] See, *Chapman v. Sheridan, Wyoming Coal Co.*, 338 U.S. 620 (1950), approving the Secretary of the Interior's interpretation of his regulations.

PROCEDURAL DUE PROCESS IS NOT IN ISSUE

Petitioners apparently contend at several points in their brief that certiorari should be granted in this case to correct some alleged violation of the rule established by this Court in *Accardi v. Shaughnessy*, 347 U.S. 260 (1965), and *Service v. Dulles*, 354 U.S. 363, relative to the binding character of administrative regulations. Both cases dealt with administrative proceedings directly against the vital personal interests of *Accardi*[7] and *Service*[8] and to which they were parties.

Administrative actions adverse to each of these parties, obtained without observance of applicable regulations, were reversed by this Court in order to assure that the parties "will have been afforded that due process required by the regulations." *Accardi v. Shaughnessy, supra*, at 268.

The issues and the relationship of the parties here are in no way similar. Alaska completed its application and relevant amendments by early in 1963. The State's selection was posted in the appropriate land and status records the same year (R. 179). Publication of notice was accomplished in a timely manner (R. 181), pursuant to a Land Office decision of October 8, 1964 (R. 181). Not until late in May of 1965,

---

[6] For other cases where the Department of Interior has properly given effect premature filing see: *Hunt v. State of Utah*, 59 I.D. 44 (1945); *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193 (1916).

[7] The proceedings against Accardi were to effect his deportation from the United States.

[8] The United States State Department proceeded against Service to terminate his employment for alleged security violations.

some two years after the State's application was perfected, did the earliest of the petitioners file his original notice (R. 181). The administrative procedures utilized to transfer the watershed involved here, procedures to which petitioners were not parties, bear no reasonable relationship in kind or in time to the denials of procedural due process found in *Accardi* and *Service.*

THE DECISION BELOW IS OF NARROW SCOPE AND ARISES FROM A FACT SITUATION WHICH DOES NOT APPEAR TO HAVE ARISEN ELSEWHERE

The petitioners' assertion that the decision below has widespread implications beyond the limits of the watershed sought by Alaska is simply not supported by fact.

The Court of Appeals recognized that action by the State of Alaska during its ninety (90) day preference right period was essential to Alaska's successful selection of the previously withdrawn lands. Absent appropriate action during that ninety (90) day period, no selection could have been accomplished by the State. Thus, there is nothing whatsoever in the opinion below to suggest that Alaska could select even one acre of withdrawn land and petitioners fear for the "many millions of acres" (Petitioners' Br. p. 18) constitute only a little puffing. The thrust of the opinion below is clear: If Alaska is to select so much as an acre of land of a previously withdrawn status, it must perfect its selection within ninety (90) days of the date that land become available.[9]

---

[9] Alaska could, of course, make a selection after the ninety (90) day preference period but only on the same basis as any other potential applicant.

This preferential treatment afforded the State of Alaska does not eminate from the Secretary of the Interior as suggested by the petitioners, but from the unequivocal terms of the Alaska Statehood Act by which Congress made available the assets with which the new State could establish and maintain a government.

The interest of the State of Alaska, and in particular of the present and future residents of its most populous area, in obtaining title to the watershed in issue is admittedly substantial. No doubt the interest of the petitioners in defeating the State's claim is equally substantial as they anticipate great profits from potential subdivision and sale or other utilization of these lands. But to say that the case is of wider scope or that it "effects the operation of the system of land management as a whole" is mere advocacy.

Perhaps no set of regulations can be ideally designed to answer all questions which arise under them with clarity and finality and without resort to human reasoning. The Secretary of the Interior reached an entirely reasonable conclusion based upon the applicable regulations and the rationale which underlines them. Nowhere does there appear any arbitrary decision which would warrant review of the Secretary of the Interior or the Court of Appeals.

CONCLUSION

Absent a showing that the Secretary of the Interior acted arbitrary or illegally or that a similar fact situation will ever again arise, there is no such substantial question as would warrant *Certiorari.*

DATED at Anchorage, Alaska this 10th day of February, 1969.

Respectfully submitted,

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APPENDIX A

STATE OF ALASKA, William A. Egan, *Governor*
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LANDS
344 6th Avenue, Anchorage

March 12, 1964

Bureau of Land Management
Anchorage Land Office
Sixth and Cordova
Anchorage, Alaska

Ref: S-1209, City of
Anch. Watershed
Anch. 058566

Gentlemen:

Reference is made to State selection application, Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are additional open lands within the general boundaries of the selection. The State of Alaska hereby requests that its application be amended to embrace all available lands within the following described townships:

T. 11 N., R. 2 W., SM
Sec. 4: Lots 1, 2, 3, 4, S½N½, SW¼, SE¼
Sec. 5: Lots 1, 2, 3, 4, S½N½, SW¼, SE¼
Sec. 7: Lots 1, 2, 3, 4, E½W½, NE¼, SE¼
Sec. 8: All
Sec. 9: All
Sec. 18: Lots 1, 2, 3, 4, E½W½, NE¼, SE¼
Containing Approx. 3,777.66 acres

Those lands described in BLM opening order dated Feb. 14, 1964.

Thank you for your co-operation.

Sincerely yours,
ROSCOE E. BELL, *Director*
By: /s/ John E. Friberg
John E. Friberg,
Acting Selection Officer

CMF:bm
cc: Lands & Minerals
Officer Records

SUPREME COURT, U. S.

FEB 26 1969

JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1968

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ANDREW J. KALERAK, JR., ET AL., *Petitioners,*

v.

WALTER J. HICKEL, Secretary of the Interior, AND STATE OF ALASKA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

The Secretary does not deny, and Alaska admits (Alaska Opp. p. 7), that the State's original application for the lands in question was "premature." And the State's claim cannot be supported by its subsequent amendments, for the Secretary of Interior's regulations unqualifiedly declared that amendments to

invalid selections "will not be allowed" (Pet. pp. 15, 45a). Indeed, the Secretary does not deny that the decision below is inconsistent with his regulations. Accordingly, it is clear that the Secretary's award of the land to Alaska is illegal, for as this Court's *Accardi* and *Service* decisions hold, those regulations *do* bind the Secretary of Interior, as well as the parties who appear before him.[1] The *Accardi-Service* principle will fail of its beneficent purpose to subject public officers to the rule of law if they come to believe that this Court will tolerate such manifest error. In short, if this case were factually unique, as respondents assert, the appropriate disposition in light of their silences and admissions on the merits would not be denial of certiorari; it would be summary reversal.

Respondents, recognizing the absence of legal justification, seek to sustain the Secretary's decision on grounds of equity (Hickel Opp. p. 6; Alaska Opp. p. 7). But this approach itself raises a question of profound public importance warranting the grant of certiorari. For we submit that the Secretary is not free to dispose of public lands according to his own notions of equity, and should be promptly disabused of such pretentions. Where, as here, Congress has already weighed the interests and established the policies according to which rights in public lands may be

[1] The State argues that the *Accardi-Service* principle is limited to regulations which afford due process of law. But the *Sheridan-Wyoming Coal* case, which Alaska itself cites (p. 8), recognized that the Secretary of Interior is bound by regulations indistinguishable from those involved in this case. See p. 16 of the Petition for Certiorari. We note also that in both *Service and Vitarelli* v. *Seaton,* petitioners alternatively tendered due process questions, on which this Court expressly declined to pass. See, 354 U.S. 363 at 372; 359 U.S. 535 at 539-540.

acquired, it is the duty of the Secretary and the courts to implement Congress' design rather than to substitute their own views of the equities. It must therefore be emphasized that the Secretary's decision herein did not implement the "preference given to Alaska by Congress" as he claims (Hickel Opp. p. 6), but instead nullified the conditions on that preference which Congress deliberately adopted. See Pet. pp. 11-14.

While we insist that "equitable" concepts cannot justify the result reached below, we by no means concede that the equities favor the State. At the heart of the matter is the State's assertion that the filing of an amendment to the original application was a mere "technical defect" (Alaska Opp. p. 5, n. 4), which could have been avoided simply by filing a new application in the same terms. But if the State had filed a new application, which would have complied with the statute and the regulations, the notice posted by the State would have made reference thereto, and petitioners and others in a similar position would have been apprised that a valid application had been made and that the lands were thereby closed to entry. Instead, petitioners were informed of an application which had been prematurely filed and of amendments which, as Alaska says, "expressly referred on their face to the original application" and "thereby incorporated [it] by express reference" (Alaska Opp. p. 5); although petitioners were on notice that "Alaska had unambiguously asserted its claim to these lands" (Hickel Opp. p. 6), the same notice advised them that *no valid claim* had been made and that the lands remained open to settlement. Thus, whereas both respondents, like the Court of Appeals, rely upon the notice to negate any prejudice to petitioners, that notice actually con-

stituted an open invitation to enter those lands because it instructed that they were not the subject of any prior *lawful* claims. If "equitable circumstances" (Hickel Opp. p. 6) are to be considered, they surely do not favor Alaska, whose errors induced petitioners' change of position.[2]

The Public Land Order withdrawing all public lands in Alaska from appropriation for two years, which had been anticipated in the Petition (p. 18), has now been promulgated.[3] The State is pleased to characterize our assessment of the consequences of the decision below in light of that order as "pure fantasy" and "only a little puffing" (Alaska Opp. pp. 7 and 9). But we anticipate that the Court will be more impressed by the Secretary's refusal to address himself to our analysis than by the State's colorful characterizations. For if the Secretary believed that we had exaggerated the potential impact of the decision below on the administration of the public land laws (Pet. pp. 18-22), he would have been quick to say so, since he

---

[2] Since the equities have never been regarded to be pertinent to proceedings such as the present, petitioners did not adduce proof of the cost to them resulting from their justified reliance. But the Department's file, which is part of the record in this Court, contains letters by petitioners Kalerak and Trombley to the Department which describe their efforts to perfect their homestead rights. Kalerak recites that he had resided on the homestead site in a trailer for several weeks until he was driven off by the cold because no electricity and heating were available. Trombley wrote that he and petitioner Sipielman had built approximately one-half mile of access road across and into their respective claims. While we do not ask the Court to accept these letters for the truth of the statements therein, we submit that they are sufficient to require rejection of respondents' bald assertion, untested at a hearing, that the equities favor the State.

[3] P.L.O. 4582, 34 F.R. 1025.

is fully cognizant of this Court's interest in his views on this subject.

Moreover, the importance of this case cannot be measured simply by its immediate context, for it is characteristic of a recurring problem. Regulations such as those involved herein impose formal prerequisites for the assertion of private interests in the public domain under numerous statutes. If noncompliance with such regulations is to be excused on grounds of "intent," as the Court of Appeals decided, or equity, as respondents urge, these regulations will inevitably fail of their purpose. In our Petition (p. 17, n. 14), we noted a case in which the Secretary had awarded a lease to a party (Union) which had submitted the highest bid but had failed to sign that bid, notwithstanding the requirement of the Secretary's regulation that bids be signed. The next highest bidder (Superior), who had complied with the formal requirements, brought an action against the Secretary to enjoin him from issuing the lease to Union and to direct him to issue the lease to Superior. Shortly after our Petition was filed, the United States Court of Appeals for the District of Columbia Circuit issued its decision in this litigation.[4] The Court of Appeals, affirming the District Court, held against the Secretary. The dominant theme of Judge Burger's opinion for a unanimous Court is that adherence to the Secretary's regulations is essential if the integrity of the bidding system is to be maintained. That decision, while in accord with the principles established by this Court, is in irreconcilable conflict with the instant decision of the court below, which was prepared to waive ad-

[4] *Superior Oil Co.* v. *Udall* (C.A.D.C. Nos. 22,192 and 22,194, decided Jan. 6, 1969).

herence to such regulations. We respectfully invite the Court's attention to the opinion as a whole, but we here quote two passages which are particularly pertinent:

> "The Secretary's concern over the differential [of two million dollars] between Union and Superior is understandable but we think it misses the central legal issues and the important public policy underlying strict rules in bidding. It is also very important that bidders who comply faithfully and scrupulously with bidding regulations should not in effect be penalized by the errors of less careful bidders who fail to follow correct procedures." (Slip Op., p. 9)
>
> * * *
>
> "It would be plainly inequitable to Superior and damaging to the long range public interest in the integrity of the bidding process to allow Union, whose error has created this problem, to have a second opportunity to bid against Superior and all other bidders." (Slip Op., p. 12)

The District of Columbia Circuit's evaluation of the equities and the public interest is far sounder than that of respondents herein. To paraphrase Judge Burger's language, we submit that "it would be plainly inequitable to [petitioners] and damaging to the long-range public interest in the integrity of the [administration of the public land laws] to allow [Alaska] whose error has created this problem" to retain these lands at the expense of Petitioners, whose entry, unlike Alaska's, was in full compliance with the law.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Petition for Certiorari should be granted.

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